Supreme Court, U.S.
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No. 05-

IN THE
Supreme Court of the United States

GLOBAL CROSSING TELECOMMUNICATIONS, INC.,
Petitioner,

v.

METROPHONES TELECOMMUNICATIONS, INC.,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 47 U.S.C. § 201(b) of the Communications Act of 1934 creates a private right of action for a provider of payphone services to sue a long distance carrier for alleged violations of the FCC's regulations concerning compensation for coinless payphone calls.

2. Whether 47 U.S.C. § 276 the Communications Act of 1934 preempts state law claims for *quantum meruit* and breach of implied contract based on a long distance carrier's alleged failures to compensate a payphone service provider for coinless payphone calls.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner states: Global Crossing Telecommunications, Inc., is an indirect, wholly owned subsidiary of Global Crossing Limited, a Bermuda corporation. Global Crossing Limited, in turn, is more than 10 percent owned by STT Crossing, Ltd., a wholly owned subsidiary of Singapore Technologies Telemedia, Pte., a Singapore entity that is wholly owned by the Government of Singapore.

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PETITON FOR A WRIT OF CERTIORARI

Petitioner Global Crossing Telecommunications, Inc., respectfully petitions for certiorari to the United States Court of Appeals for the Ninth Circuit in *Metrophones Telecommunications, Inc. v. Global Crossing Telecommunications, Inc.*, No. 04-35287.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 423 F.3d 1056 (9th Cir. 2005), and is reproduced at App. 1a-39a. The relevant opinion of the district court is unpublished and is reproduced at App. 40a-58a.

JURISDICTION

The Ninth Circuit issued its opinion on September 8, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

47 U.S.C. § 201(a) provides in relevant part: "It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor."

47 U.S.C. § 201(b) provides in relevant part: "All charges, practices, classifications, or regulations for and in conjunction with such telecommunications service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful. . . . The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter."

47 U.S.C. § 206 provides in relevant part: "In case any common carrier shall do, or cause to be done, any act, matter,

or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter 5 required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter. . . ."

47 U.S.C. § 207 provides in relevant part: "Any person claiming to be damaged by a common carrier subject to the provisions of this chapter . . . may bring suit for the recovery of damages for which such common carrier shall be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction."

47 U.S.C. § 276(b)(1)(A), in relevant part, directs the FCC to "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone[s]."

47 U.S.C. § 276(c) provides: "To the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements."

STATEMENT OF THE CASE

This case presents a direct conflict involving important provisions of the Communications Act of 1934, as augmented by the Telecommunications Act of 1996, and its implementing regulations.

A. Statutory Background

Since 1990, Congress has required owners and operators of payphones to allow consumers to use access codes (such as 800 numbers or "10-10-220") to make "coinless" calls from payphones. These codes allow consumers to "dial around" the

payphone service providers' preselected (and usually high-priced) long distance, or "interexchange," carriers. As a result, payphone service providers, as of 1990, did not receive any payment from their preselected carriers or individual callers for most of these types of calls. Furthermore, payphone service providers could not secure payment for most such calls from anyone else.

In light of that situation, Congress directed the FCC in the Telecommunications Act of 1996 to create "a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone[s]." 47 U.S.C. § 276(b)(1)(A). After considering several alternatives, the FCC ultimately adopted what is sometimes called a "carrier pays" plan. It requires long distance carriers that carry coinless payphone calls to compensate payphone service providers for their customers' calls. *See* 47 C.F.R. §§ 64.1300-1340; *American Public Communications Council v. FCC*, 215 F.3d 51 (D.C. Cir. 2000) (upholding the plan). The rules specify a default compensation rate for such calls, unless the payphone owners and long distance carriers contractually agree to other arrangements. 47 C.F.R. §§ 64.1300(b)-(d). The FCC's regulations also require carriers to track coinless payphone calls, report them to payphone owners, make payments on a quarterly basis, and submit their systems to rigorous audits.

Over the past several years, numerous payphone service providers have sued long distance carriers, seeking compensation allegedly due under the FCC's regulations. While some payphone service providers have brought these complaints in FCC administrative proceedings, most instead have filed lawsuits in various courts across the country.

Federal courts uniformly have recognized, however, that nothing in § 276 of the 1996 Act authorizes such lawsuits. That section, courts have emphasized, has no "rights creating"

language; it merely directs the FCC to adopt some form of regulatory plan – not even necessarily a "carrier pays" type plan. *See, e.g., APCC Servs., Inc. v. Sprint Communications Co.*, 418 F.3d 1238, 1246 (D.C. Cir. 2005); *Greene v. Sprint Communications Co.*, 340 F.3d 1047, 1050-52 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 2026 (2004); *Phonetel Techs. v. Network Enhanced Telecom*, 197 F. Supp. 2d 720 (E.D. Tex. 2002). And while § 206 of the Communications Act of 1934 (which envelops the Telecommunications Act of 1996) allows private actions to remedy violations of the Act's *statutory* provisions, it does not allow such suits with respect to agency regulations. *Id.*

Accordingly, payphone service providers have attempted to manufacture other legal theories for bringing such actions in court. These substitute legal theories give rise to the current dispute.

B. The Current Controversy

In late 2001, Respondent Metrophones Communications, Inc., an owner and operator of payphones headquartered in Washington State, brought separate lawsuits in the United States District Court for the Western District of Washington against several long distance carriers, including Petitioner Global Crossing Telecommunications, Inc. Respondent alleges that for several years beginning in the late 1990's, Petitioner has failed to provide a proper accounting and to compensate it fully for coinless calls transmitted via Petitioner's network. Respondent seeks a judgment requiring Petitioner to conduct an accounting of amounts owed since the second quarter of 1999 and to pay such amounts, which allegedly total tens of thousands of dollars per year.

Respondent initially grounded its complaint in 47 U.S.C. § 276. After the Ninth Circuit ruled, however, that this statute did not provide a private right of action, *see Greene*, 340 F.3d

at 1053, Respondent moved to amend its complaint. Respondent asserted that sections 201(b), 407, and 416(c) of the Act permitted it to seek compensation in federal court. It also advanced several state-law theories for recovery. Petitioner moved to dismiss the case, on the ground that Respondent's complaint failed to state a cause of action and that all proposed amendments likewise would be futile.

The district court dismissed Respondent's § 276 claim but allowed it to amend its complaint, ruling that § 201(b) and § 416(c) – though not § 407 – create private rights of action to recover underpayments for coinless calls. App. 51a-53a. It also allowed Petitioner to proceed with state law claims for *quantum meruit*, breach of implied contract, and negligence. App. 46a-50a, 56a. Acknowledging that its rulings allowing Petitioner to proceed with various causes of action raised issues on which there is a "substantial ground for difference of opinion," App. 61a, the district court certified its order for interlocutory appeal under 28 U.S.C. § 1292(b).

Respondent and the other long distance carriers Petitioner had sued all filed appeals in the Ninth Circuit. Shortly thereafter, Respondent settled its cases with all of the carriers except for Petitioner.

The Ninth Circuit accepted Petitioner's appeal and affirmed in part and reversed in part. Creating a circuit split, and pushing aside language in its prior *Greene* decision saying that nothing anywhere in the Act created a private cause of action, App. 7a-8a, the Ninth Circuit held that § 201(b) gives rise to a private right of action to recover for violations of the FCC's payphone compensation rules. App. 6a-21a. It also held that § 276(c) of the Act – which prohibits any state requirements inconsistent with the federal regime – did not preempt Petitioner's state-law claims for *quantum meruit* or breach of implied contract. App. 24a-36a. The Ninth Circuit

rejected the remaining claims that the district court had allowed to go forward. App. 22a, 23a, 36a-38a.

REASONS FOR GRANTING THE WRIT

Pursuant to the Telecommunications Act of 1996, the FCC adopted regulations requiring long distance carriers to compensate payphone owners for the carriers' customers' "coinless" calls – calls, that is, made using access codes (such as 800 numbers or "10-10-220") instead of the payphones' preselected long distance carriers. The federal circuits are now expressly divided over what the FCC calls an "important" issue: whether § 201(b) of the Communications Act of 1934 – which broadly prohibits any "unjust and unreasonable" communications practice – creates a private right of action under which payphone owners may sue long distance carriers for alleged underpayments under the FCC's regulations. The D.C. Circuit has held that no such private cause of action exists, but the Ninth Circuit here ruled that one does.

This Court should grant review now to resolve this conflict, as well as the interrelated issue whether payphone owners may invoke state contract-law theories to seek additional compensation for coinless calls. Coinless calling generates hundreds of millions of dollars in annual revenue, and telecommunications companies – most of which operate across the country – need clear and uniform rules in order to structure and operate this business. Furthermore, the Ninth Circuit's ruling is wrong. The Ninth Circuit grounded its decision in the FCC's passing suggestion in a 2003 order that a private cause of action exists. But that suggestion was nothing more than brief dicta referring to a prior D.C. Circuit opinion, and the D.C. Circuit now has rebuked that interpretation of its precedent. More important, even if the FCC had spoken with sufficient perspicuity on this issue, the Ninth Circuit overlooks that federal agencies may not create private rights of action. Only Congress may do so, and it has not done so here.

Accordingly, this Court should bring the Ninth Circuit into line and make plain for the several similar lawsuits pending across the country – and for the several more that undoubtedly are waiting in the wings – that complaints with respect to the FCC's payphone compensation rules must be brought, it at all, administratively to the FCC.

I. This Court Should Resolve the Conflict Over Whether § 201(b) Of The Communications Act Of 1934 Creates A Private Right Of Action For A Long Distance Carrier's Alleged Violations Of The FCC's Regulations Regarding Compensation For Coinless Payphone Calls.

A. The Federal Circuits Are Expressly Divided Over This Issue.

Section 206 of the Communications Act of 1934 provides that telecommunications carriers may be held liable for anything prohibited or declared to be unlawful "in this chapter" – that is, in one of the Act's statutory provisions. Section § 201(b), in turn, generally declares unlawful any communications practice that is "unjust or unreasonable."

In 2003, while addressing an unrelated aspect of the FCC's payphone compensation rules, the FCC stated that any long distance carrier's failure to compensate a payphone service provider for coinless payphone calls would violate § 276 and be "unjust and unreasonable" under § 201(b). Without providing any additional detail, the FCC asserted simply that:

> [T]he D.C. Circuit in upholding the reasonableness of the Commission's decision in *APCC v. FCC*, [215 F.3d 51, 56 (D.C. Cir. 2000),] found that [payphone service providers] had remedies to recover [debts] from the delinquent carriers. A failure to pay in accordance with the Commission's payphone rules, such as the rules expressly

> requiring such payment that we adopt today, constitutes both a violation of section 276 and an unjust and unreasonable practice in violation of section 201(b) of the Act.

Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996, 18 F.C.C.R. 19,975, 19,990 ¶ 32 (2003) ("*2003 Payphone Order*").

Since the FCC made that statement, two federal circuits have considered whether § 276's command to establish a coinless call compensation system or § 201(b)'s "unjust or unreasonable" clause supplies any basis for payphone providers to sue long distance carriers in federal court to recover compensation allegedly owed pursuant to the FCC's payphone compensation rules. These circuits agreed that § 276 does not create any cause of action in federal court. *See APCC Servs., Inc. v. Sprint Communications Co.*, 418 F.3d 1238, 1246 (D.C. Cir. 2005); *Greene v. Sprint Communications Co.*, 340 F.3d 1047, 1050-52 (9th Cir. 2003), *cert. denied,* 124 S. Ct. 2026 (2004); *cf. Phonetel Techs. v. Network Enhanced Telecom,* 197 F. Supp. 2d 720 (E.D. Tex. 2002) (reaching same conclusion). These circuits, however, expressly dis-agreed as to whether § 201(b) creates a private cause of action. *Compare APCC Servs.*, 418 F.3d at 1247-48 *with* App. 6a-21a.

The D.C. Circuit was the first court to address the latter issue. It held that § 201(b) did not create a private right of action for violations of the FCC's payphone compensation rules, for that would "transform § 201(b) into a catchall provision, converting any common carrier's violation of a Commission order or regulation into a violation of the Act actionable in federal court" – a result plainly at odds with Congress' desire to limit private actions only to those rights created in the Act itself. *APCC Servs.*, 418 F.3d at 1247. The D.C. Circuit also rejected the argument that the FCC authoritatively interpreted § 201(b) as creating a private right

of action. *Id.* at 1247-48. The D.C. Circuit majority made clear that its prior opinion in *APCC v. FCC* did not stand for the proposition for which the FCC cited it in the *2003 Payphone Order*, so that order obviously could not constitute a reasoned or authoritative interpretation of the Act. *See APCC Servs.*, 418 F.3d at 1247-48; *see also id.* at 1253-54 (Ginsburg, C.J., dissenting) (arguing, to no avail, that FCC's *2003 Payphone Order* reasonably interpreted § 201(b) as creating private right of action). At least one federal district court since has adopted the D.C. Circuit's holding. *See Smartstop, Inc. v. AT&T Corp.*, 374 F. Supp. 2d 930 (D. Colo. 2005).

In the decision below, however, the Ninth Circuit expressly "disagree[d] with the majority opinion in [the D.C. Circuit] case and, instead, adopt[ed] the position of [that court's] dissenting judge" that § 201(b) does indeed create a private cause of action for violations of the FCC's payphone compensation rules. App. 13a n.5. Although the Ninth Circuit stated unequivocally in *Greene* that "[t]here is no private right of action . . . to recover damages for [a carrier's] alleged failures to pay compensation for [coinless] calls as required by FCC regulations," the court now said that § 201(b) had not been at fairly at issue there. App. 7a-8a (quoting *Greene*, 340 F.3d at 1053. Considering the import of § 201(b) supposedly for the first time, the Ninth Circuit held that the FCC's brief dicta in the *2003 Payphone Order* authoritatively deemed "unjust and unreasonable" a long distance carrier's failure to compensate a payphone service provider according to the FCC regulations. In addition, the Ninth Circuit concluded – notwithstanding the D.C. Circuit's rebuke in *APCC* of the FCC's dicta – that the FCC's assertion regarding § 201(b) was reasonable and thus entitled to deference. App. 6a-21a.

The Ninth Circuit acknowledged that interpreting § 201(b), as it was, to prohibit violating the FCC's payphone compensation regulations could logically convert that statutory provision into "a catchall provision equating violations of

Commission regulations with statutory violations." App. 18a (quoting Defendant's Brief). But because the FCC has not asserted (thus far, at least) that every violation of its regulations constitutes an "unjust and unreasonable" practice under 201(b), the Ninth Circuit declared that it did not need to address whether the logical import of its decision rendered that decision suspect. App. 18a-19a.

There is no way to reconcile the Ninth Circuit's decision here with the D.C. Circuit's *APCC* decision. The D.C. Circuit denied rehearing en banc, by a 5-3 vote, on November 10, 2005, so this is the only Court that can resolve the conflict.

B. There Is A Pressing Need For National Uniformity In This Realm Of Telecommunications Law.

The FCC participated as *amicus* in both the D.C. Circuit and Ninth Circuit cases, noting that these cases "raise[] important issues regarding enforcement of the Communications Act, in general, and the Act's payphone compensation provisions, in particular." Brief for FCC as Amicus Curiae in Support of Appellee at 1, *Metrophones Telecommunications, Inc. v. Global Crossing Telecommunications, Inc.*, 423 F.3d 1056 (9th Cir. 2005) (No. 04-35287); *see also APCC Servs.*, 418 F.3d at 1240 (acknowledging FCC *amicus* participation). The FCC's assessment of this issue's importance is correct, and there is a corresponding imperative for uniformity in this area, for three reasons.

1. As the district court in the case arising in the District of Columbia observed, "[t]he payphone industry is big business." *APCC Servs., Inc., v. Worldcom, Inc.*, 305 F. Supp. 2d 1, 7 (D.D.C. 2001), *rev'd, APCC Servs., Inc. v. Sprint Communications Co.*, 418 F.3d 1238, 1247-48 (D.C. Cir. 2005). Of particular relevance here, coinless calling generates approximately $225 million per year in payphone compensation

payments from long distance carriers to payphone providers. Petitioner itself has paid over $21 million to payphone providers over the last eighteen months. Payphone providers nevertheless continue to seek even more compensation for coinless calls. The ways in which these disputes may be litigated matter greatly to companies involved – and to companies considering becoming involved – in the telecommunications industry.

2. Most major telecommunications carriers do business in several states, as do payphone owners accounting for most of the Nation's payphones. Petitioner, like other leading long distance carriers, transmits phone calls originating from payphones in all fifty states, and a significant portion of the traffic it handles originates from payphones. Petitioner handles not only its own retail traffic, but the traffic of numerous other, smaller long distance resellers.

Pursuant to the FCC's regulations, Petitioner has developed and implemented sophisticated tracking and payment systems, as well as rigorous audit procedures, covering its payphone compensation obligations. Petitioner developed these systems specifically to implement the FCC's uniform compensation processes. Having to address disparate judicial decisions threatens to disenable these uniform mechanisms. In particular, allowing payphone owners to bring lawsuits in some jurisdictions but not others potentially would require Petitioner to develop systems to accommodate different jurisdictions' requirements, many of which could depend – as described *infra* at 16-17 – on individual judges' interpretations of state common law.

The consequences of having telecommunications carriers subject to uneven judicial mandates is particularly unacceptable because the FCC is fully equipped to handle any complaints or disputes administratively. *See, e.g.*, 47 U.S.C. § 154(i) (granting FCC this power). Federal telecommunications

law and its implementing regulations form a complex, and frequently shifting, landscape. The FCC is expert at navigating that terrain. On the other hand, as the Ninth Circuit itself, drawing on precedent from other circuits, previously recognized:

> To imply a private right of action [to recover alleged underpayments for coinless payphone calls] runs counter to this centralization of function and to the development of a coherent national telecommunications policy. It would also put the interpretation of a finely-tuned regulatory scheme "squarely in the hands of some 700 federal district judges, instead of the Commission. . . . The result would be to deprive the FCC of necessary flexibility and authority in creating, interpreting, and modifying telecommunications policy.

Greene, 340 F.3d at 1052-53 (quoting *Conboy v. AT&T Corp.,* 241 F.3d 242, 253 (2d Cir.2001) (quoting in turn *New England Tel. & Tel. Co. v. Public Utils. Comm'n,* 742 F.2d 1, 6 (1st Cir.1984) (Breyer, J.))).

3. If this Court delays resolving the conflict at issue here, many pending and future lawsuits promise to exacerbate the current legal confusion, with no offsetting benefit from further percolation. Over the past several years, payphone service providers have filed lawsuits in courts across the country – including in California, New York, Washington, Colorado, Utah, Virginia, Pennsylvania, Arizona, Nevada, Utah, and Texas – and the District of Columbia. *See Smartstop,* 374 F. Supp. 2d 930 (Colorado); *APCC Servs.,* 305 F. Supp. at 7-9 (describing actions in Utah, Virginia, Pennsylvania, and Arizona); *In re Qwest Communications Corp. Payphone Serv. Providers Compensation Litig.,* 219 F. Supp. 2d 1356 (J.P.M.D.L. 2002) (California, Nevada, and Utah); *Telemex Int'l, Inc. v. Global Crossing Telecommunications, Inc.,* No.

05-6374 (W.D.N.Y.) (pending; no published opinion yet); *Phonetel Techs.*, 197 F. Supp. 2d 720 (Texas). Some of these actions have settled, but others remain pending. Many more are sure to follow if this Court allows the Ninth Circuit's decision to stand.

This Court should promptly resolve whether the Communications Act allows such lawsuits to be brought. The D.C. and Ninth Circuits already have set out the opposing views on whether such a private cause of action exists. This Court would not gain anything by waiting for future circuits to choose sides. The sooner this Court brings uniformity to this important area of telecommunications law, the better.

C. The Ninth Circuit's Holding That Such A Private Cause Of Action Exists Is Incorrect.

The Ninth Circuit's holding that § 201(b) creates a private cause of action in federal court for a telecommunication carrier's alleged violations of the FCC's payphone compensation regulations is incorrect. This Court recently reaffirmed that "private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval,* 532 U.S. 275, 286 (2001). And in considering whether Congress has created such a right, "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right *but also a private remedy*." *Id.* (emphasis added). In other words, it is not enough to show that the statutory scheme confers the authority on an agency to craft substantive regulations; "the question remains whether [the statutory scheme] confers a private right of action to enforce them." *Id.* Without such a statutorily created right, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 287.

The Ninth Circuit disregarded these restrictions. It is true that § 201(b) generally declares that "unjust or unreasonable" practices in conjunction with telecommunications services are unlawful. Even assuming *arguendo* that the FCC authoritatively determined in its 2003 order that failing to compensate payphone service providers for coinless calls is "unjust or unreasonable,"[1] there is nothing in the Act that "confers a private right of action to enforce" that FCC determination in federal court. *Sandoval*, 532 U.S. at 286. Section 206 of the Act allows private lawsuits in federal court to seek redress only for actions declared unlawful "in this chapter"– that is, in a statutory provision. No *statutory provision* – neither § 276, the one provision that actually speaks to payphone compensation, nor the general language of § 201(b) – provides that failing to compensate a payphone service provider for coinless calls is unlawful.

The Ninth Circuit brushed aside this predicament, reasoning that additional statutory language in § 201(b) "gives the Commission broad power to enact such 'rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.'" App. 15a (quoting § 201(b)). The FCC's payphone compensation rules, the Ninth Circuit continued, can therefore be said simply to interpret § 201(b)'s "unjust or unreasonable" passage. But this circuitous method of suggesting that the FCC's payphone compensation requirements have a statutory basis runs headlong into *Sandoval*. In that case, this Court held that a statute giving federal agencies the authority to draft regulations to effectuate the provisions of

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[1] The D.C. Circuit, as explained above, rejected the argument that the FCC did so. *See APCC Servs.*, 418 F.3d at 1247-48. The Ninth Circuit, oddly enough, ruled that the FCC authoritatively determined that failing to compensate payphone service providers for dial around calls is "unjust or unreasonable," App. 10a-14a, even though this supposed FCC determination is dicta and rests solely an assertion that *the D.C. Circuit* has found such practices unlawful under the Act – a position that the D.C. Circuit now has squarely rebuked. App. 12a-13a & n.5.

a statutory scheme does *not* automatically transform ensuing regulatory prohibitions into statutory prohibitions. 532 U.S. at 284-89. When such regulatory prohibitions forbid something that – although within the agency's power to prohibit – is not otherwise prohibited in the statutory scheme, such prohibitions cannot claim the "statutory" grounding necessary to sustain a private cause of action. *Id.*

That is precisely the case here. The FCC may have the power to issue regulations that require certain carriers to compensate payphone service providers at a certain rate for coinless calls, but – as the Ninth Circuit itself acknowledged later in its opinion – the Act itself "does not impose any [such] obligations on carriers." App 18a. Accordingly, § 201(b)'s general "unjust or unreasonable" language cannot be read as doing so either, lest, as the D.C. Circuit recognized, it improperly be transformed into a "catchall provision, converting any common carrier's violation of a Commission order or regulation into a violation of the Act actionable in federal court." *APCC Servs.*, 418 F.3d at 1247.

II. This Court Should Resolve The Related Issue Whether The Communications Act Preempts State-Law Claims For *Quantum Meruit* And Breach Of Implied Contract Based On A Long Distance Carrier's Alleged Failures To Compensate A Payphone Service Provider For Coinless Phone Calls.

This Court also should review the Ninth Circuit's holding allowing payphone service providers to bring state law claims against long distance carriers for alleged failures to compensate providers for coinless calls. Section 276(c) of the Act expressly preempts state requirements "[t]o the extent [they] are inconsistent with the Commission's regulations." The Ninth Circuit, however, ruled that a payphone provider's claims for *quantum meruit* and breach of implied contract are consistent with federal regulations when, as here, the provider

"seek[s], under state law, exactly the same rate of compensation for the same calls as it would be entitled to receive under the federal regulations." App. 34a (*quantum meruit* claim); *see also* App. 33a (breach of implied contract claim).

The problem with this analysis is that it necessarily depends on the assumption that a private cause of action exists to enforce the FCC's payphone compensation rules. Federal requirements may form, as the FCC's payphone compensation rules here unquestionably do, a "critical element" of a plaintiff's state law claim only when a private cause of action exists to enforce those requirements. *Buckman Co. v. Plaintiffs' Legal Committee,* 531 U.S. 341, 353 (2001). Therefore, if, as the D.C. Circuit has held, no private cause of action exists to enforce the FCC's payphone compensation rules, then plaintiffs cannot avoid this situation by bringing a breach of contract claim for failing to abide by the federal rules. *Id.*; *see also Broder v. Cablevision Sys. Corp.,* 418 F.3d 187, 198 (2d Cir. 2005) (holding that plaintiff may not bring state-law contract claim for violation of certain federal telecommunications pricing rules because no private cause of action exists to enforce such rules); *see also Grochowski v. Phoenix Constr.,* 318 F.3d 80, 86 (2d Cir. 2003) (holding that plaintiff may not bring state-law *quantum meruit* or breach of implied contract claim for failure to pay compensation according to certain federal prevailing wage schedules because no private cause of action exists to enforce such wage schedules); *Kemp v. Medtronic, Inc.,* 231 F.3d 216, 236 (6th Cir. 2000) ("Plaintiffs cannot circumvent" absence of a private right of action in federal statute by seeking to enforce it through state common-law claim). To allow such a backdoor method of enforcing federal regulations would "exert an extraneous pull on the scheme established by Congress, and is therefore pre-empted by that scheme." *Buckman Co.,* 531 U.S. at 353.

The Ninth Circuit also suggested – though it is unclear whether it independently held – that breach of implied contract claims are viable in this realm because the FCC regulations themselves "contemplate that [payphone service providers] and carriers, in some circumstances, will agree to contracts for payphone compensation with terms that differ from those contained in the regulations." App. 32a. It apparently follows, in the Ninth Circuit's view, that a state-law claim based on private contract principles cannot be inconsistent with the FCC regulations. *Id.*

This conclusion rests on a careless reading of the regulations. It is one thing to say that the regulations permit parties to *agree* to alternate compensation arrangements and another thing entirely to say that they permit states to invoke equitable principles (even if based on contract law) to *force* alternate arrangements upon unwilling parties.

Furthermore, the FCC specifically has explained that private compensation arrangements are allowed "so that small [long distance companies] may avoid the expense of instituting a tracking system" for coinless calls "and undergoing [third party] audit[s]" to ensure the system is accurate. *The Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996,* 70 Fed. Reg. 720, 720 (Jan. 5, 2005). In the absence of this circumstance, there is no suggestion whatsoever that the FCC's default compensation rules do not govern.

Respondent is a large company, and it already has created a sophisticated and costly call tracking system. It also has put into place record retention processes to meet the FCC's specific requirements and has undergone the appropriate audits. Accordingly, there is no reason why Petitioner, or the FCC, would want to allow Petitioner's compensation obligations with respect to coinless payphone calls to be governed by state-by-state contract law. Such state law would subject Respond-

ent and other large long distance carriers to potentially fifty sets of varying rules governing payphone compensation, with different limitations periods, different implied contractual duties, and different rules for damages – in short, different circumstances under which carriers would have to pay compensation for coinless calls. The inconsistencies in such a state of affairs would plainly undermine the Telecommunications Act's call for, and the industry's need for, uniform compensation rules.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

METROPHONES TELECOMMUNICATIONS, INC., a Washington corporation, *Plaintiff-counter-defendant-Appellee,* v. GLOBAL CROSSING TELECOMMUNICATIONS, INC., a Michigan corporation, *Defendant-counter-claimant-Appellant,* and UNIDENTIFIED COMPANIES I THROUGH X, *Defendants.*	No. 04-35287 D.C. No. CV-03-00694 OPINION

Appeal from the United States District Court
for the Western District of Washington
Marsha J. Pechman, District Judge, Presiding

Argued January 12, 2005, and
Resubmitted August 31, 2005
Seattle, Washington

Filed September 8, 2005

Before: Mary M. Schroeder, Chief Judge, and Alfred T. Goodwin and Susan P. Graber, Circuit Judges.

Opinion by Judge Graber

COUNSEL

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Joel Marcus, Federal Communications Commission, Washington, D.C., for the amicus curiae.

OPINION

GRABER, Circuit Judge:

We again are asked to decide whether a provider of payphone services may sue a long distance carrier to recover compensation that federal regulations, 47 C.F.R. §§ 64.1300-.1340, obligate the carrier to pay. We faced that question once before, in *Greene v. Sprint Communications Co.*, 340 F.3d 1047, 1050-51 (9th Cir. 2003), *cert. denied*, 541 U.S. 988 (2004), and answered "no." This time, the circumstances have changed materially: since our decision in *Greene*, which was made without the participation of the Federal Communications Commission ("Commission" or "FCC"), the Commission has interpreted a provision of the Communications Act that we did *not* address explicitly in *Greene*, 47 U.S.C. § 201(b), to allow such actions. As we explain below, we defer to the Commission's reasonable, authoritative interpretation of that statute. *See, e.g., Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S.Ct. 2688, 2702-12 (2005) ("*Brand X*") (deferring to the FCC's interpretation of a statute).

Consequently, we affirm the district court's decision to allow Plaintiff Metrophones Telecommunications, Inc., a payphone service provider, to go forward with its claim under § 201(b) against Defendant Global Crossing Telecommunications, Inc., a long distance carrier. We also hold that Plaintiff may pursue two of its three state law claims, because they are not preempted by 47 U.S.C. § 276(c). We reverse, however, the district court's decision to allow Plaintiff to pursue claims under 47 U.S.C. § 416(c) and under a third state-law theory.

I. BACKGROUND

A. *Statutory and Regulatory Background*

Before 1996, payphone service providers ("PSPs") were largely uncompensated for "dial-around" coinless calls – calls in which the caller uses an access code or a "1-800" number to place calls through a long distance carrier other than the carrier with which the PSP has a contract. *Am. Pub. Commc'ns Council v. FCC*, 215 F.3d 51, 53 (D.C. Cir. 2000). As of 1990, PSPs were prohibited by statute from blocking such dial-around calls, *Ill. Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555, 559 (D.C. Cir. 1997) (per curiam), but were unable to secure payment for them. Therefore, in the Telecommunications Act of 1996, Pub. L. No. 104-104, 100 Stat. 5,[1] Congress directed the Commission to enact regulations establishing "a per call

[1] Congress directed that the Telecommunications Act of 1996 be inserted into the Communications Act of 1934. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377 (1999). In this opinion, we use "Communications Act" to refer to the entire statute – i.e., Title 47, Chapter 5 – and "Telecommunications Act" when referring specifically to the 1996 Act or to portions of the statute added in 1996.

compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone." 47 U.S.C. § 276(b)(1)(A).

The Commission then adopted rules making particular carriers responsible for compensating PSPs for dial-around calls. 47 C.F.R. §§ 64.1300-.1340; *see also Sprint Corp. v. FCC*, 315 F.3d 369, 371-73 (D.C. Cir. 2003) (describing the development of the rules); *Pay Tel. Reclassification & Comp. Provisions of Telecommc'ns Act of 1996*, 18 F.C.C.R. 19,975 (2003) ("*2003 Payphone Order*") (adopting final rules for fair compensation of PSPs). The rules require carriers to pay PSPs on a per-call basis at a rate agreed upon by the parties, 47 C.F.R. § 64.1300(b), and set default per-call rates that are mandatory in the absence of such an agreement, *id.* § 64.1300(c), (d). The rules also set forth detailed compensation procedures and reporting requirements, which the parties may modify by agreement. *Id.* § 64.1310.

B. *Procedural History*

Plaintiff filed this action in district court alleging that Defendant had failed to pay the full amount owed for calls placed from Plaintiff's payphones. Originally, Plaintiff brought its action under 47 U.S.C. § 276 – the statute by which Congress had directed the Commission to enact regulations to fairly compensate PSPs. However, soon after Plaintiff filed its action, this court held that § 276 provides no private right of action – express or implied – to recover compensation for payphone calls. *Greene*, 340 F.3d at 1053.

In the wake of *Greene*, Defendant moved for judgment on the pleadings as to Plaintiff's federal claim. The district court agreed that *Greene* foreclosed Plaintiff's original claim under § 276, but permitted Plaintiff to amend its complaint to assert federal claims under 47 U.S.C. §§ 201(b) and 416(c), provisions dealing with "unjust and unreasonable" practices of carriers and the duty to comply with FCC orders, respectively. The court rejected Defendant's argument that those amendments would be futile because they would not survive a motion to dismiss.

Defendant also moved for judgment on the pleadings on Plaintiff's state law claim for "quantum meruit," arguing that the claim was preempted by 47 U.S.C. § 276(c), which expressly preempts state laws that are inconsistent with the federal regulations. The district court denied Defendant's motion, concluding that the quantum meruit claim was consistent with the federal regulations. For the same reason, the court allowed Plaintiff to add two additional state law claims for breach of implied contract and negligence.

The district court granted Defendant's motion requesting an interlocutory appeal, 28 U.S.C. § 1292(b), and we agreed to allow the appeal.

II. STANDARDS OF REVIEW

In an interlocutory appeal, we review de novo the district court's denial of a motion for judgment on the pleadings. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986) (reviewing de novo the denial of a motion to dismiss for failure to state a claim); *Turner v. Cook*, 362 F.3d 1219, 1225 (9th Cir.) (reviewing de novo a dismissal

on the pleadings), *cert. denied*, 125 S.Ct. 498 (2004). The district court's interpretation of a statute is reviewed de novo, *SEC v. McCarthy*, 322 F.3d 650, 654 (9th Cir. 2003), as are its decisions regarding preemption, *Transmission Agency of N. Cal. v. Sierra Pac. Power Co.*, 295 F.3d 918, 927 (9th Cir. 2002).

We review for abuse of discretion the district court's decision to permit amendment of a complaint. *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 853 (9th Cir.), *amended by* 312 F.3d 416 (9th Cir. 2002). An error of law is one form of an abuse of discretion. *Koon v. United States*, 518 U.S. 81, 100 (1996).

III. DISCUSSION

A. *Plaintiff may pursue compensation in a private action under the FCC's reasonable, authoritative interpretation of 47 U.S.C. § 201(b).*

1. Greene *did not address 47 U.S.C. § 201(b).*

We recognized in *Greene* that any person who suffers damages as a result of a common carrier's violation of a "provision[] of this chapter" – that is, of the Communications Act, 47 United States Code, Chapter 5 – may seek recovery of those damages in federal court under 47 U.S.C. §§ 206 and 207.[2] *Greene*, 340 F.3d at 1050 & n.2.

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[2] Title 47 U.S.C. § 206 provides, in relevant part:

> In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in

(Continued on following page)

Nonetheless, we held that a common carrier's failure to pay compensation for payphone calls does not violate 47 U.S.C. § 276 and therefore does not give rise to a claim under §§ 206 and 207. *Id.* at 1050-51. We reasoned that, although the regulations enacted *pursuant to* § 276 require carriers to pay PSPs, the *statute itself* merely requires the Commission to adopt regulations to ensure fair compensation for PSPs. *See id.* Because a claim under §§ 206 and 207 requires violation of a statute, and because a carrier does not violate § 276 directly when it fails to pay PSPs, "there is no violation of the Act to be remedied through the private right of action afforded by §§ 206 and 207." *Id.* at 1052.[3] The payphone regulations alone, we held, could not create an enforceable obligation where none existed in the statute. *Id.* at 1051 (citing *Alexander v. Sandoval*, 532 U.S. 275, 284-89 (2001)).

In *Greene*, we were not asked to decide whether a carrier's failure to compensate a PSP would violate provisions of the Communications Act *other than* § 276, nor did we give explicit consideration to any other provision of that Act. Nonetheless, several of our statements suggest

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consequence of any such violation of the provisions of this chapter. . . .

Section 207, in turn, gives injured parties the right either to make complaint before the Commission *or* to bring an action in district court. 47 U.S.C. § 207.

[3] The plaintiffs in *Greene* sought, in the alternative, to enforce § 276 through an implied cause of action under *Cort v. Ash*, 422 U.S. 66 (1975). The *Greene* panel's decision not to imply a private right of action to enforce the regulations, 340 F.3d at 1052-53, is not controlling here because Plaintiff asserts only the statutory cause of action provided for in §§ 206 and 207.

that our decision foreclosed any recovery of payphone compensation under federal law. For example, we said:

> There is no private right of action for the relief that PSPs seek, to recover damages for [a carrier's] alleged failure to pay compensation for dial-around calls as required by FCC regulations promulgated pursuant to § 276 of the Telecommunications Act.

Id. at 1053; *see also id.* at 1052 (stating that failure to pay a PSP causes "no violation of the Act"). Thus, the central question briefed by the parties in the present appeal is whether the broad statements in *Greene* preclude an action to enforce two different sections of the Act – 47 U.S.C. §§ 201(b) and 416(c) – that we did not address in *Greene*. We turn first to § 201(b) and conclude that, in view of the FCC's reasonable, authoritative interpretation of § 201(b), *Greene* does not prevent Plaintiff from bringing an action under that section.

2. *The FCC's interpretation of § 201(b) is entitled to deference.*

Section 201 requires common carriers to furnish "communication service upon reasonable request therefor," 47 U.S.C. § 201(a), and further states:

> All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful. . . .

Id. § 201(b). Plaintiff asserts that Defendant's failure to pay it proper compensation for dial-around calls violates

§ 201(b) because it is a "practice[] . . . in connection with . . . communication service" that is "unjust or unreasonable." Significantly, Plaintiff's interpretation of the statute is shared by the Commission, which stated in its *2003 Payphone Order* that

> [a] failure to pay in accordance with the Commission's payphone rules . . . constitutes . . . an unjust and unreasonable practice in violation of section 201(b) of the Act.

18 F.C.C.R. at 19,990, ¶ 32; *see also APCC Servs., Inc.*, 20 F.C.C.R. 2073, 2085, ¶ 26 (2005) ("[A carrier's] failure to pay payphone compensation to [PSPs] violated section 64.1300(c) of the rules *and thus section[] . . . 201(b) of the Act.*" (emphasis added)).[4] The Commission also cited § 201, in addition to § 276 and several other sections, as the authority for its initial enactment of the payphone regulations in 1999. *See Implementation of Pay Tel. Reclassification & Comp. Provisions of Telecomms. Act of 1996*, 14 F.C.C.R. 2545, 2648, ¶ 232 (1999). Under the FCC's interpretation, the failure to pay compensation to PSPs violates § 201(b)'s prohibition of unjust or unreasonable practices and, therefore, is actionable in federal district court pursuant to §§ 206 and 207.

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[4] In both decisions, the Commission also stated that a failure to pay in accordance with the regulations violates § 276. *2003 Payphone Order*, 18 F.C.C.R. at 19,990, ¶ 32; *APCC Servs.*, 20 F.C.C.R. at 2085, ¶ 26. We need not address what effect, if any, this interpretation of § 276 has on our decision in *Greene*, because Plaintiff has not appealed the dismissal of its claim under § 276.

a. *Our implicit holding in* Greene *cannot trump the FCC's interpretation, if that interpretation is entitled to* Chevron *deference.*

Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984), "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion." *Brand X*, 125 S.Ct. at 2699. If we owe *Chevron* deference to the Commission's interpretation of § 201(b), then our own prior, contrary interpretation of the statute can trump the agency's construction *only* if our decision held that its "construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* at 2700.

After *Brand X*, there can be no doubt that *Greene* does not prevent us from affording deference to the FCC's interpretation of § 201(b), if deference is otherwise due. We did not mention § 201(b) in *Greene* and thus could not have offered an interpretation that "follows from the unambiguous terms" of the relevant statute, *Brand X*, 125 S.Ct. at 2700. Thus, even if Defendant is correct that *Greene's* holding should be interpreted to have covered § 201(b) implicitly, that implicit holding would be insufficient to trump an agency construction to which we owe deference. But the question remains: do we owe deference to the FCC's interpretation of § 201(b)?

b. *The* Chevron *framework applies.*

An administrative interpretation "qualifies for *Chevron* deference when it appears that Congress delegated

authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). In *Brand X*, the Supreme Court afforded *Chevron* deference to an interpretation contained in a declaratory ruling of the FCC. *See* 125 S.Ct. at 2699 (holding that, because the FCC is authorized to promulgate binding legal rules and it "issued the order under review in the exercise of that authority," its interpretation of the Communications Act was entitled to *Chevron* deference).

We see no reason to treat the interpretation of § 201(b) in the *2003 Payphone Order* differently, despite Defendant's argument that the interpretation is entitled to no deference because of its brevity. We rejected a similar argument in *Pacific Bell v. Cook Telecom, Inc.*, 197 F.3d 1236, 1242 (9th Cir. 1999): "Although the FCC's statements are brief and lack elaborate analysis, those statements deliberately and unambiguously single out paging providers for special notice." We explained that the FCC order contained "a relatively detailed and thorough attempt to explain the FCC's decisions concerning a very difficult statute" and that the statements did not "appear to have been made in anticipation of any particular litigation." *Id.*

Similarly, here, the statement in the *2003 Payphone Order* arose in the context of a complex decision about the operation of the whole system of payphone regulation. In context, it is apparent that the Commission considered the ability of PSPs to recover compensation for dial-around calls in private actions to be integral to the proper functioning of the payphone compensation system.

Some background is necessary to understand why this is so. The Commission has reversed positions several times on the issue of *which* carrier should pay the PSP when more than one carrier handles a single call. *See generally 2003 Payphone Order*, 18 F.C.C.R. at 19,977-83, ¶¶ 5-17. For example, a call may be carried from the payphone by an interexchange carrier, but completed to the recipient of the call by a switch-based reseller. In one phase of the development of the rules, interexchange carriers had to pay PSPs and then seek repayment from the switch-based reseller that completed the call. *Id.* at 19,981, ¶ 15; *id.* at 19,984, ¶ 20. However, in the final rules adopted in the 2003 Payphone Order, the Commission ordered switch-based resellers to pay PSPs directly. *Id.* at 19,986, ¶ 24.

PSPs opposed that final decision because it is easier for them to collect payment from only one entity (i.e., the interexchange carriers). The Commission rejected the PSPs' position in part because the PSPs could recover damages from delinquent carriers in private actions:

> To the extent that [the PSPs'] argument is based on ease in collecting owed debts, the D.C. Circuit . . . found that the PSPs had remedies to recover this debt from the delinquent carriers. A failure to pay in accordance with the Commission's payphone rules, such as the rules expressly requiring such payment that we adopt today, constitutes both a violation of section 276 and an unjust and unreasonable practice in violation of section 201(b) of the Act.

Id. at 19,990, ¶ 32 (footnote omitted).[5] In short, in adopting the final rules in the *2003 Payphone Order*, the Commission relied on the availability of actions for damages under §§ 206 and 207.

Because it is apparent that the Commission's interpretation of § 201(b) was connected with the broader reasoning that led to its adoption of the final rules, we find no reason to think that the interpretation of § 201(b) advanced in the *2003 Payphone Order*, and supplemented by the Commission's amicus briefs in this case, is not the "fair and considered judgment" of the agency. *See Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 563 n.7 (9th Cir. 2002) (noting that the fact that an agency's interpretation of a statute that it administers "comes to us in the form of an *amicus* brief does not make it 'unworthy of deference'" (quoting *Auer v. Robbins*, 519 U.S. 452, 462

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[5] The Commission was referring to a D.C. Circuit decision in which the court upheld the Commission's determination of the cost per payphone call. *See Am. Pub. Communications Council v. FCC*, 215 F.3d 51, 56 (D.C. Cir. 2000). The court there reasoned that it was reasonable to exclude uncollected debt from the per-call cost because, "[a]s intervenor long distance carriers remind us, the '[f]ailure to pay the required compensation is a violation of FCC rules for which the carrier is subject to damages as well as fines and penalties.' *See* 47 U.S.C. §§ 206-08, 501-03 (1994)." *Id.*

The D.C. Circuit since has held that private actions, in fact, are not available under the Act. *APCC Servs., Inc. v. Sprint Commc'ns Co.*, No. 04-7034, 2005 WL 1512837, at *5-*10 (D.C. Cir. June 28, 2005) (per curiam). For the reasons that we articulate, we disagree with the majority's opinion in that case and, instead, we adopt the position of the dissenting judge: that "the Commission acted [ ]reasonably when it deemed a common carrier's failure to pay just and reasonable compensation an unjust and unreasonable practice." *Id.* at *15 (Ginsburg, J., dissenting in part and from the judgment).

(1997))). Thus, we will apply the *Chevron* framework to the FCC's interpretation of § 201(b).

c. *The FCC's interpretation of § 201(b) is a reasonable construction of an ambiguous statutory provision.*

Under *Chevron's* two-step analysis, we first must determine whether the statute makes Congress' intent clear; if so, we must "give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. If not, and the statute is ambiguous as to the precise question at issue, "we defer at step two to the agency's interpretation so long as the construction is 'a reasonable policy choice for the agency to make.'" *Brand X*, 125 S.Ct. at 2702 (quoting *Chevron*, 467 U.S. at 845).

We conclude that the text of § 201(b) does not unambiguously answer the precise question at issue here: whether the failure to pay a PSP is a "practice[] . . . in connection with . . . communication service" that is "unjust or unreasonable." In determining whether Congress clearly expressed its intent with regard to that question, we must consider § 201(b) in its statutory context. *Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1060-61 (9th Cir. 2003) (en banc).

"Because 'just,' 'unjust,' 'reasonable,' and 'unreasonable' are ambiguous statutory terms," courts normally owe "substantial deference to the interpretation the Commission accords them." *See Capital Network Sys., Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994). The statutory context does not convince us otherwise. The portion of § 201(b) at issue here is among the core original provisions of the Communications Act of 1934, which required

telecommunications carriers to file with the Commission "a list of tariffs, or 'schedules,' showing 'all charges . . . and . . . the classifications, practices, and regulations affecting such charges.'" *Ting v. AT&T*, 319 F.3d 1126, 1130 (9th Cir.) (quoting 47 U.S.C. § 203(a)), *cert. denied*, 540 U.S. 811 (2003).[6] The Commission may initiate hearings at which carriers must defend their tariffs, 47 U.S.C. § 204; after such hearings, the Commission may "determine and prescribe what will be the just and reasonable charge . . . and what classification, regulation, or practice is or will be just, fair, and reasonable," *id.* § 205(a).

We first dispense with the idea that Congress clearly intended to limit the practices that can be deemed "unjust or unreasonable," under § 201(b), to those that are contrary to practices prescribed solely under the authority of § 205. To the contrary, it appears to us that Congress has extended the scope of § 201(b) far beyond those core original provisions. Section 201(b) gives the Commission broad power to enact such "rules and regulations as may be necessary in the public interest to carry out the provisions of this Act," *including* sections that were added later by the Telecommunications Act of 1996. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-78 & n.5 (1999) (holding that the Commission's rulemaking

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[6] Although the tariff-filing provisions of the Act have not changed, in 1996 Congress authorized the Commission to stop enforcing the rate-filing requirements, which apparently it has done. *See Ting*, 319 F.3d at 1132 (describing the Commission's decision to "forbear from applying" the tariff filing requirements of 47 U.S.C. § 203, as it was newly authorized to do by 47 U.S.C. § 160(a)). The Commission decided that "market forces [are] sufficient to protect consumers from unjust and unreasonable rates, terms, and conditions" and now requires carriers to establish contracts with consumers. *Id.*

authority under § 201(b) extends to the implementation of provisions enacted in 1996). And, as we mentioned above, the Commission cited both §§ 201 to 205 *and* § 276 as its authority for enacting the payphone regulations. Given the reach of the Commission's rulemaking authority under § 201(b), it would be strange to hold that Congress narrowly limited the Commission's power to deem a practice "unjust or unreasonable." This is especially true now that Congress has given the Commission the authority to waive the tariff-filing requirements, *see supra* note 6, presumably reducing the relevance of the specific procedures provided for in §§ 203 to 205.

Second, although we agree that there are statutory constraints on the Commission's power to deem a practice "unjust and unreasonable," we do not think it clear from the statutory context that Congress intended to limit "practices . . . in connection with . . . communication service," 47 U.S.C. § 201(b), to those that directly involve a carrier's relationship with its customers. Certainly, as the Supreme Court has held in construing closely related statutes, the term "practice" must be interpreted to be consistent with the words around it – that is, it must be a practice connected "with the fixing of rates to be charged and prescribing of service to be rendered." *Mo. Pac. R. Co. v. Norwood*, 283 U.S. 249, 257 (1931); *see also United States v. Pa. R.R. Co.*, 242 U.S. 208, 229 (1916) ("[W]e must rather suppose its association was intended to confine it to acts or conduct having the same purpose as its associates.").[7] But unlike practices involving a carrier's

[7] The Supreme Court construed the term "practice" as used in the Interstate Commerce Act ("ICA"), from which the Communications Act was derived. *See* S. Rep. No. 781, 73d Cong., 2d Sess. 4 (1934) (detailing

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general corporate governance, *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 400-02 (D.C. Cir. 2004), or its employment decisions, *Mo. Pac.*, 283 U.S. at 257, the practice of providing compensation to PSPs for payphone service is not clearly unrelated to a carrier's telephone rates and services. As Congress and the Commission have recognized, PSPs must be compensated if customers are to be able to use the dial-around long distance service that the carrier provides. *See, e.g.*, 47 U.S.C. § 276(b)(1) (ordering the Commission to prescribe regulations "[i]n order to promote competition among [PSPs] and promote the widespread deployment of payphone services to the benefit of the general public"). In short, § 201(b) is ambiguous enough that unjust or unreasonable practices can encompass a broad range of activities related to the services provided and rates charged by a long distance carrier. *Cf. La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 371-72 (1986) (holding that the terms "charges," "classifications," and "practices," as used in section 152(b) of the Communications Act, encompass a company's internal accounting and depreciation practices), *superseded by statute on other grounds as stated in New York v. FCC*, 267 F.3d 91, 101-02 (2d Cir. 2001). The activity deemed unjust and unreasonable here does not cross the line.

Finally, we consider whether Congress, in § 276 itself, expressed a clear intent to make private actions to recover payphone compensation unavailable under any provision of the Act. We conclude that it did not. It may be that § 276

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the provisions of the ICA from which Congress drew each section of the Communications Act). "[D]ecisions construing the ICA are persuasive in establishing the meaning of the Communications Act." *Conboy v. AT&T Corp.*, 241 F.3d 242, 250 (2d Cir. 2001).

does not itself oblige carriers to pay PSPs, as we held in *Greene*, 340 F.3d at 1050-51, but nothing in the text of § 276 suggests that Congress intended to prevent the obligations that *other* statutes impose on carriers from being enforced as part of the system of payphone regulation that it ordered the Commission to design. This is not a situation in which a more general statute, § 201(b), has been interpreted to create a private right of action where a more specific section, § 276, has been interpreted not to create one. *Cf. Santiago Salgado v. Garcia*, 384 F.3d 769, 774 (9th Cir. 2004) (noting the "elementary tenet of statutory construction that where there is no clear indication otherwise, a specific statute will not be controlled or nullified by a general one" (internal quotation marks omitted)), *cert. denied*, 125 S.Ct. 1670 (2005). That is, although § 276 more specifically addresses the subject of payphone regulation, it does not impose any obligations on carriers – and, perhaps more importantly, does not relieve them of any obligations. On the subject of a common carrier's obligations, § 276 is silent and cannot be considered more specific than § 201(b).

In sum, we conclude that nothing in the statute clearly precludes the construction offered by the Commission. Next, we must determine whether that construction was a "reasonable policy choice" or, instead, was "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 845, 844.

Defendant argues that the Commission's interpretation is unreasonable because it would convert § 201(b) into a "catchall provision equating violations of Commission regulations with statutory violations." But, as the Supreme Court said in *Brand X*, "[w]e need not decide

whether a construction that resulted in these consequences would be unreasonable because we do not believe that these results follow from the construction the Commission adopted." 125 S.Ct. at 2708. In other words, the Commission did *not* conclude that every violation of its regulations is an "unjust and unreasonable" practice, nor does its interpretation necessarily mean that a violation of any other regulation is an "unjust and unreasonable practice." Instead, the Commission identified as "unjust and unreasonable" a single practice, and we must determine whether the agency acted reasonably with respect to that practice.

We think that it did. Without repeating our discussion above, we reiterate that we have no reason to think that the FCC acted unreasonably when it deemed the failure to pay compensation to PSPs to be a "practice[ ]" in connection with "communication service." The Commission has "invoked § 201(b) in several contexts" to which the Commission's authority to prescribe just and reasonable charges and practices under § 205 "does not pertain" and which do not pertain directly to a carrier-customer relationship. *APCC Servs., Inc. v. Sprint Commc'ns Co.*, No. 04-7034, 2005 WL 1512837, at *15 (D.C. Cir. June 28, 2005) (per curiam) (Ginsburg, J., dissenting in part and from the judgment) (citing *ASCOM Commc'ns, Inc. v. Sprint Commc'ns Co.*, 15 F.C.C.R. 3223, 3227 (2000) (addressing a carrier's attempts to collect payments from a PSP for certain payphone calls); *Tel. No. Portability*, 18 F.C.C.R. 23697, 23709 n.76 (2003) (addressing the FCC's telephone number portability rules); and *Core Commc'ns, Inc. v. SBC Comm'ns, Inc.*, 18 F.C.C.R. 7568, 7578, ¶ 25 (2003) (addressing a carrier's failure to comply with merger conditions)). We are "hard-pressed" to say that the

FCC acted unreasonably in determining what is "unjust and unreasonable" under § 201(b). *Id.*

Moreover, as we discussed above, the Commission did not unreasonably interpret Congress' intent in enacting § 276. It is apparent from the *2003 Payphone Order* that allowing for private actions to recover payphone compensation is an integral part of the regulatory system that Congress ordered the Commission to design. As the Commission further explains in its amicus brief, foreclosing private actions under federal law "would appear to deny payphone providers a damages remedy *anywhere*," including before the Commission. That is because the statutory basis for relief is the same in either forum: Section 206 makes common carriers liable in damages for violations of "this chapter" and § 207 gives injured persons a choice of federal fora to recover those damages – the person either may "make complaint to the Commission" *or* "may bring suit for the recovery of the damages . . . in any district court of the United States of competent jurisdiction." As the Commission explains:

> In the absence of a damages remedy under §§ 206-208, the Commission still might impose penalties for violations of its rules under 47 U.S.C. § 502, but such payments would go to the United States Treasury, not to compensate payphone providers. Such sanctions would fail to fulfill the mandate of § 276(b)(1)(A) that "all payphone service providers are fairly compensated for each and every completed intrastate and interstate call."

It is, at the very least, reasonable for the FCC to conclude that Congress would not have intended to grant PSPs an entitlement to compensation and to give the Commission

broad authority to establish a mechanism to provide that compensation, but simultaneously to limit the enforcement of the statute and implementing regulations to the imposition of civil penalties. Thus, even if it is true, as we held in *Greene*, that Congress did not create a cause of action in § 276, the Commission reasonably interpreted § 201(b) to fill the gap.

Of course, our decision in *Greene* relied on policy considerations that would favor the opposite conclusion. *See, e.g., Greene*, 340 F.3d at 1053 ("To imply a private right of action runs counter to this centralization of function and to the development of a coherent national communications policy."). But, as the Supreme Court recently reiterated, resolving statutory ambiguities "involves difficult policy choices that agencies are better equipped to make than courts." *Brand X*, 125 S.Ct. at 2699 (citing *Chevron*, 467 U.S. at 865-66). In that spirit, we defer to the Commission's reasonable, authoritative interpretation of § 201(b) and hold that a private action is available to remedy the unjust and unreasonable practice of failing to pay PSPs according to the Commission's regulations.[8] Therefore, we affirm the district court's decision to grant Plaintiff leave to amend its complaint to include a claim under that section. However, as we explain below, we reverse the court's decision to allow Plaintiff to add a claim under § 416(c).

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[8] Our decision is consistent with *Alexander v. Sandoval*, 532 U.S. 275, 284 (2001), where the Court stated: "A Congress that intends the statute to be enforced through a private cause of action intends the *authoritative interpretation of the statute* to be so enforced as well." (Emphasis added.)

3. *The Commission's interpretation of § 416(c) is not entitled to deference.*

The Commission joins Plaintiff in arguing that a carrier's obligation to compensate PSPs is enforceable as a violation of 47 U.S.C. § 416(c), a provision of the Communication Act's "Procedural and Administrative" subchapter, which states:

> It shall be the duty of every person . . . to observe and comply with . . . orders [of the Commission] so long as the same shall remain in effect.

Plaintiff and the Commission assert that a failure to comply with the payphone regulations is a violation of § 416(c) and is therefore actionable under §§ 206 and 207.[9]

We have interpreted the term "order," in 47 U.S.C. § 401(b), to encompass rulemaking orders and regulations as well as adjudicative orders. *Hawaiian Tel. Co. v. Pub. Utils. Comm'n*, 827 F.2d 1264, 1270-72 (9th Cir. 1987). In view of that controlling precedent, we find no fault with the Commission's opinion that the payphone regulations are "orders" within the meaning of § 416(c). Nonetheless, we conclude that the Commission's interpretation of § 416(c) is unreasonable because it would make *every*

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[9] Unlike the Commission's interpretation of § 201(b), this interpretation of § 416(c) is not found in any FCC order and comes only from the agency's amicus briefs. We need not address whether or how the format of the Commission's interpretation affects the level of deference we afford it, because we conclude that the Commission's interpretation of § 416(c) is contrary to the clear intent of Congress. *See Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1060 (9th Cir. 2003) (en banc) (determining first whether an agency interpretation is contrary to the clear intent of Congress and, only if it is not, reaching the question whether that interpretation carries the "force of law").

pronouncement of the Commission automatically enforceable in a private action, contrary to the intent of Congress. It is technically true that § 416(c) makes a violation of any "order" of the Commission a violation of the statute itself and, thus, according to the Commission, would give rise to an action under §§ 206 and 207. But to hold that §§ 206 and 207 encompass all violations of § 416(c) would render superfluous the requirement that an action under § 206 allege a violation of a *statute*. *Cf. Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 681 (9th Cir. 2005) ("We try to avoid, where possible, an interpretation of a statute that renders any part of it superfluous and does not give effect to all of the words used by Congress." (internal quotation marks omitted)). And, because nothing (or, perhaps, everything) is prohibited by the text of § 416(c), adopting this construction would create, automatically, a private action for violation of any "order." By contrast, under § 201(b), the Commission must conclude that a practice is reasonably related to rates and services and is substantively "unjust or unreasonable" before a private action can exist.

In sum, we interpret the text of § 206 to mean that Congress did not intend for every violation of a regulation to give rise to a private action for damages. The Commission's interpretation of §§ 206, 207, and 416(c) is plainly contrary to that intent. Therefore, that interpretation is due no deference, and we reverse the district court's decision to grant Plaintiff leave to add a claim under § 416(c).

On the second question presented in this appeal, whether Plaintiff's state law claims are preempted, the Commission takes no position. We now turn to that question.

B. *Plaintiff's state law claims for breach of implied contract and "quantum meruit" are not preempted.*

"The purpose of Congress is the ultimate touchstone" in any preemption analysis, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (internal quotation marks omitted), so we look first and foremost to Congress' express statement of its intent:

> To the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements.

47 U.S.C. § 276(c); *see also CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (stating that the plain wording of an "express pre-emption clause . . . necessarily contains the best evidence of Congress' pre-emptive intent"). The presence of an express preemption provision supports an inference that Congress did not intend to preempt matters *beyond* the reach of that provision. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995) (citing *Cipollone*, 505 U.S. at 517). But an express provision does not categorically preclude courts from applying principles of implied preemption. *Id.* at 288-89. Moreover, "even when Congress declares its preemptive intent in express language, deciding exactly *what* it meant to preempt often resembles an exercise in implied preemption analysis." 1 Laurence H. Tribe, American Constitutional Law § 6-28, at 1177 (3d ed. 2000). Thus, despite our primary focus on the text of § 276(c), it bears mentioning that the Supreme Court has

> recognized at least *two types of implied pre-emption: field pre-emption*, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room

> for the States to supplement it, and *conflict preemption*, where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (citations and internal quotation marks omitted) (emphasis added).

Field preemption is absent here. It is true that § 276 substantially expands the Commission's jurisdiction and gives it broad authority to regulate both intrastate and interstate payphone calls. *See, e.g., Ill. Pub. Telecomms. Ass'n*, 117 F.3d at 561-62 (holding that the Commission may regulate rates for local coin calls). Yet, by expressly limiting federal preemption to state requirements that are *inconsistent* with the federal regulations, Congress signaled its intent not to occupy the entire field of payphone regulation. *See Ishikawa v. Delta Airlines, Inc.*, 343 F.3d 1129, 1133 (9th Cir.), *amended by* 350 F.3d 915 (9th Cir. 2003) ("[T]he 'express provisions for preemption of some state laws,' the inconsistent ones, 'imply that Congress intentionally did not preempt state law generally.'" (quoting *Keams v. Tempe Technical Inst., Inc.*, 39 F.3d 222, 225 (9th Cir. 1994))); *Total TV v. Palmer Commc'ns, Inc.*, 69 F.3d 298, 303 (9th Cir. 1995) (holding that a provision preempting inconsistent state laws was "simply a recognition that Congress did not intend to fully occupy the field"). Our conclusion is reinforced by the Communication Act's savings clause: "Nothing in this chapter contained

shall in any way abridge or alter the remedies now existing at common law or by statute. . . . " 47 U.S.C. § 414.[10]

Principles of implied *conflict* preemption, however, are relevant to our analysis, at least insofar as they help us interpret the scope of the express preemption provision. In fact, our analysis of whether state requirements are "inconsistent" with the federal regulations within the meaning of § 276(c) is substantially identical to the analysis of implied conflict preemption: whether "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Gade*, 505 U.S. at 98 (internal quotation marks omitted), or, as is more relevant in applying § 276(c), the purposes and objectives of the Commission.[11]

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[10] We also have held that federal regulation of telecommunications, in general, does not completely preempt state law. *Ting*, 319 F.3d at 1136-37; *see id.* at 1137 ("Detariffing has created a much larger role for state law and this fact is sufficient to preclude a finding that Congress intended completely to occupy the field, following the 1996 Act.").

[11] Only state requirements inconsistent with the *Commission's regulations* are preempted. 47 U.S.C. § 276(c). That fact does not absolutely preclude us from identifying a broader scope of implied preemption within § 276, but we see no cause for doing so here. Although we discern in § 276 a clear intent to create a comprehensive federal plan for payphone regulation, Congress left it to the Commission to decide how to structure the regulations and enforcement mechanisms. Congress did not express a preference for absolute national uniformity or exclusive federal enforcement, leaving those decisions to the Commission and expressly allowing for the operation of state law if consistent with the Commission's chosen plan. *Cf. CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 675 (1993) (holding that an express provision preempting all state laws "*relating to* railroad safety" was broad and would preempt state claims that cover the same subject matter) (emphasis added). Thus, in keeping with Congress' expressed intent, we will focus primarily on the purposes and objectives of the Commission's regulations.

Under both implied conflict preemption and our interpretation of § 276(c), state law is preempted "to the extent it actually interferes with the methods by which the federal [regulatory scheme] was designed to reach its goal." *Ting*, 319 F.3d at 1137 (internal quotation marks omitted).

Our task, then, is to discern the "full purposes and objectives" of the Commission's regulations and to determine whether Plaintiff's state law claims interfere, or are otherwise inconsistent, with them.

1. *The payphone regulations set defaults, but generally do not mandate uniformity.*

The Commission's regulatory system addresses three principal issues: (1) who must pay for which calls; (2) how much must they pay; (3) and what procedures must be followed in making payment. *See generally* 47 C.F.R. § 64.1300-.1340. On the latter two issues, at least, the Commission's rules are not inflexible prescriptions. In keeping with the Commission's trend toward market-based regulation, the rules allow carriers and PSPs to set alternative compensation amounts and payment methods by contract.

On the first issue – who must pay – the Commission has changed course several times but now has fixed a definite rule, as we discussed above. The rules distinctly assign liability for payment to particular classes of carriers, *see* 47 C.F.R. § 64.1300, and the Commission has sought to ensure that parties are not permitted, in negotiations over payment arrangements, to shift the effective liability for payment to other carriers. *See* The Pay Telephone Reclassification and Compensation Provisions of the

Telecommunications Act of 1996, 70 Fed. Reg. 720, 721, ¶ 11 (Jan. 5, 2005) ("*2005 Reconsideration Order*") ("For instance, demands by PSPs that an [alternative compensation arrangement] contain a provision that forces [interexchange carriers] to assume ultimate responsibility for the payphone compensation obligations of [switchbased resellers] would undermine the Commission's determination in the [*2003 Payphone Order*] that [interexchange carriers] are not liable for such payphone compensation.").

By contrast, the rules expressly allow carriers and PSPs to negotiate compensation amounts and payment methods that differ from the defaults set by the Commission. In 47 C.F.R. § 64.1300(b), carriers are directed to compensate PSPs on a per-call basis "at a rate agreed upon by the parties by contract"; only in the next subsections does the rule establish default per-call rates to be paid "[i]n the absence of an agreement." 47 C.F.R. § 64.1300(c), (d); *see also id.* § 64.1301(a) (setting various default rates "[i]n the absence of a negotiated agreement to pay a different amount"). Similarly, the rules lay out detailed reporting and payment procedures – which are intended to give PSPs the information they need to determine which carrier completed, and therefore was responsible for paying for, each call made from their payphones – but nonetheless allow parties to waive those procedures by agreeing to "alternative compensation arrangement[s]." *Id.* § 64.1310(a).[12]

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[12] The Commission has asserted some control over this contracting relationship. In January 2005, the Commission amended its rule to provide that a PSP "may not unreasonably withhold its consent to an alternative compensation arrangement." *2005 Reconsideration Order*, 70 Fed. Reg. at 723. Along with this amendment, the Commission

(Continued on following page)

In short, the payphone regulations fix liability for payment upon particular carriers, but allow the parties to negotiate about the details of that payment. *See Fair v. Sprint Payphone Servs., Inc.*, 148 F. Supp. 2d 622, 626 (D.S.C. 2001) ("[T]he FCC has left it to the parties to determine by contract the rates at which payphone service providers are to be compensated."). In the absence of an agreement, the regulations set a defined price and payment procedure.

The Commission's reliance on market-based ratesetting mechanisms is part of a broader trend in telecommunications regulation – a trend that has opened up more space for the operation of state law. For example, in the 1996 Act, Congress authorized the Commission to eliminate its longstanding requirement that telecommunications carriers file their rates, terms, and conditions with the FCC. *Ting*, 319 F.3d at 1130-32. Now, carriers generally establish contracts with consumers to govern rates, terms, and conditions, and the Commission relies principally on market competition to produce the "just and reasonable" rates required by 47 U.S.C. § 201. *Id.* at 1132. As we said in *Ting*:

> Unlike rate filing, this market-based method depends in part on state law for the protection of consumers in the deregulated and competitive marketplace. This dependence creates a compl[e]mentary role between federal and state law under the 1996 Act.

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published an order providing "guidance on the types of contracts that it would deem to be reasonable methods of compensating PSPs." *Id.* at 720.

Id. at 1141. In this environment, we cannot simply hold that all state law claims, in general, are inconsistent with federal regulation of telecommunications, especially where the payphone regulations are silent as to the method of enforcement and the role of state law. Therefore, we must look carefully at Plaintiff's state law claims to determine whether they complement, or are inconsistent with, the federal payphone regulations.

2. *Plaintiff's state law claims may go forward to the extent that they are not inconsistent with federal regulations.*

As an initial matter, we note that a provision expressly preempting certain state "requirements," like § 276(c), can "reach [] beyond positive enactments, such as statutes and regulations, to embrace common-law duties." *Bates v. Dow Agroscis. LLC*, 125 S.Ct. 1788, 1798 (2005). To determine whether Plaintiff's state law claims are preempted, we must consider the theory of each claim and determine "whether the legal duty that is the predicate" of that claim is inconsistent with the federal regulations. *Cipollone*, 505 U.S. at 523-24; *see also Ishikawa*, 343 F.3d at 1132 ("[W]e cannot see how *the duty the state common law imposed* . . . could be inconsistent with the federal guidelines, which require the same thing with more specificity." (emphasis added)). Even when a state law requirement must be equivalent to a federal regulation to survive preemption, it is not necessary at the pleading stage that the state requirement "be phrased in the *identical* language as its corresponding [federal] requirement." *Bates*, 125 S.Ct. at 1804; *see also id.* (noting that, at the trial stage, the court's jury instructions can ensure that the state claim does not exceed its proper scope).

Plaintiff's amended complaint asserts three claims for violation of state law: quantum meruit (or "unjust enrichment," as this claim was labeled in Plaintiff's amended complaint), breach of implied contract, and negligence. We look to Washington law and to the allegations in Plaintiff's complaint to flesh out the legal duty that Plaintiff seeks to enforce.[13] So far as is apparent from the pleadings, Plaintiff's "implied contract" and "quantum meruit" or "unjust enrichment" claims correspond to the two types of implied contracts recognized under Washington law: contracts implied in fact and contracts implied in law, respectively.

a. *Contract Implied in Fact*

A contract implied in fact is like an express contract except that it arises not from the parties' words, but instead from actions or circumstances that demonstrate a mutual intention to enter into a contract. *See Heaton v. Imus*, 608 P.2d 631, 632 (Wash. 1980) ("A contract implied in fact is an agreement of the parties arrived at from their conduct rather than their expressions of assent."); *Eaton v. Engelcke Mfg., Inc.*, 681 P.2d 1312, 1314 (Wash. Ct. App. 1984) ("A true implied contract, or contract implied in fact, does not describe a legal relationship which differs from an express contract: only the mode of proof is different."). "[T]he legal relationship formed does not differ whether the contract is expressed or implied in fact." 25 Wash. Prac., Contract Law and Practice § 1.16 (West 1998).

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[13] In so doing, we make no comment as to the merits of any of Plaintiff's claims. Defendant has not argued, thus far in the litigation, that any of those claims fails to state a claim under Washington law.

In its claim for breach of "implied contract," Plaintiff characterizes the interaction between itself and Defendant as conduct evidencing a mutual intention to enter into a contract. Plaintiff's theory is that, by making its payphones available to the general public, Plaintiff impliedly offered them for the use of Defendant's customers at the rates established by the FCC. Then, "[b]y accepting, transporting, and completing calls made from Plaintiff's payphones by Defendant['s] customers, Defendant[] impliedly accepted Plaintiff's offer of service," forming a contract for payphone compensation in the exact amount set by the FCC.

This claim, insofar as it is premised on the existence of a contract between the parties, cannot be preempted by § 276(c). The Commission's regulations contemplate that PSPs and carriers, in some circumstances, will agree to contracts for payphone compensation with terms that differ from those contained in the regulations. *See* discussion *supra* Part III.B.1, pp. 12770-72. In those circumstances, state contract law, not the federal regulations, would govern the resolution of contract-related questions, such as whether a contract was formed, what terms the parties agreed to, and whether the contract was breached. *See, e.g., Fair*, 148 F. Supp. 2d at 626 ("While federal regulations authorize the existence of payphone compensation contracts, whether the specific agreements at issue in the present case are illegal will be determined by state law."). As in the context of ratemaking, where private contracts have replaced rigid rate prescriptions, state contract laws provide a background that is not only consistent with, but is integral to, the market-based mechanism of the federal regulations. *See Ting*, 319 F.3d

at 1146 (holding that state consumer protection laws do not conflict with 47 U.S.C. §§ 201 and 202).

The state law claim is even stronger when the implied agreement is to pay what the FCC requires. Seeking such payments cannot, by definition, be inconsistent with what the FCC requires.

b. *Contract Implied in Law*

The preemption question becomes more complicated where the premise of the claim is not an agreement between the parties, but an equitable duty to pay. A contract implied in law is not technically a contract at all, but is a "non-contractual obligation that is treated procedurally as if it were a contract." 25 Wash. Prac., Contract Law and Practice § 1.16. The obligation to pay is imposed by law, not by the defendant's agreement to enter into a contract; it is imposed to prevent the defendant from being unjustly enriched by services provided in the absence of a contract for which the plaintiff deserves, and expected, payment. *Id.* The plaintiff recovers in "quantum meruit," which is the court's determination of the reasonable value of the services provided. *See Heaton*, 608 P.2d at 632-33 (describing the doctrine of "quasi contract").

In fashioning quantum meruit relief, the court – like the federal payphone regulations – would be setting a default value for the services that Plaintiff provided. Plainly, an award of quantum meruit that assigned a different default value for payphone calls would be inconsistent with the federal regulations and therefore preempted. Recognizing this potential problem, Defendant argues that Plaintiff's quasi-contract claim is preempted because a court *could* assign not only a different rate of

compensation, but also "payment for calls that are not compensable and assignment of liability to the wrong entity."

But it is not clear that the mere possibility of an inconsistent award should preempt Plaintiff's claim as it was pleaded in the original complaint. In its original complaint, Plaintiff explicitly assigned a value of 24 cents per call to those uncompensated services – the same value assigned by the federal regulation, 47 C.F.R. § 64.1300(d). In its amended complaint, Plaintiff reworded the claim to seek "the reasonable value of the economic benefits conferred on Defendant[]," but Plaintiff represented in its brief and at argument before this court that it would be seeking, under state law, exactly the same rate of compensation for the same calls as it would be entitled to receive under the federal regulations. Moreover, as did the court in *Precision Pay Phones v. Qwest Communications Corp.*, the district court here assumed that 47 C.F.R. § 64.1300 would control the valuation of the services in the quantum meruit claim. *See* 210 F. Supp. 2d 1106, 1118 (N.D. Cal. 2002) (stating that, "*[h]ad the FCC regulation not set a default rate*, Plaintiff would be free to prove under state law the value of the service" (emphasis added)), *disapproved on other grounds by Greene*, 340 F.3d at 1051 n.4. In fact, in distinguishing its own quasi-contract counterclaim, even Defendant has suggested that a claim is not preempted if it "relies *exclusively* on the existence of the FCC's regulations." Insofar as Plaintiff's claim relies exclusively on the regulations, we cannot say that it is "inconsistent" with the federal regulations. *See Bates*, 125 S. Ct. at 1804 (noting that district can instruct the jury on the relevant federal standards in order to ensure that the state claim remains consistent with federal regulations).

A "hypothetical conflict is not a sufficient basis for preemption." *Total TV*, 69 F.3d at 304; *see also Ishikawa*, 343 F.3d at 1132 ("LabOne argues . . . that state tort law *could* be inconsistent with federal regulations. LabOne, however, makes no attempt to show that anything about the state law applied in this case actually *was* inconsistent. . . . The district court invited and the plaintiff urged that the jury use the federal requirements to evaluate whether LabOne performed its duties with due care."). As in those cases, the mere possibility of inconsistent remedies is insufficient to require preemption of all quasi-contract or "implied in law" claims.

Our answer would be different if § 276(c) gave the Commission *exclusive* authority to regulate rates or other terms of payphone compensation, making preemption complete. Indeed, in situations of complete preemption it has been suggested that claims for recovery in quantum meruit would be preempted from the outset. For example, a statute providing that "no State or local government shall have any authority to regulate . . . the rates charged by" cellular telephone providers, 47 U.S.C. 332(c)(3)(A), has been held to preempt any claim that would require a court to set a reasonable rate or to assess the reasonableness of rates charged. *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069, 1073-74 (7th Cir. 2004) (citing *In re Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. 17,021, 17,035 (Aug. 14, 2000)); *see also AT&T Corp. v. FCC*, 349 F.3d 692, 701 (D.C. Cir. 2003) (noting that the FCC had "strongly suggest[ed] that a claim based on *quantum meruit* would be preempted" by § 332(c)(3)(A)) (citing *Petitions of Sprint PCS & AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, 17 F.C.C.R. 13,192, 13,198 n.40 (2002)). Similarly, we have held that,

because the Federal Energy Regulatory Commission has "exclusive authority to determine the reasonableness of wholesale rates," a plaintiff's claim was preempted insofar as it "require[d] the district court, at some point, to determine the fair price of the electricity that was delivered under the contract." *Pub. Util. Dist. No. 1 v. IDACORP Inc.*, 379 F.3d 641, 647-48 (9th Cir. 2004).

Those cases differed from the present case in that regulation of rates by state and local entities was absolutely barred. Here, by contrast, only "inconsistent" state requirements are barred. As stated originally, Plaintiff's quasi-contract claim sought recovery for unjust enrichment in the exact amount that it was entitled to be paid under the federal regulations and, consequently, would not require the district court to determine a reasonable price, let alone to set an "inconsistent" price. Thus, we affirm the district court's decision to deny judgment on the pleadings on this claim.

c. *Negligence*

A negligence claim, in Washington, requires proof of a duty, a breach of duty, a resulting injury, and proximate cause between the breach and the injury. *Hutchins v. 1001 Fourth Ave. Assocs.*, 802 P.2d 1360, 1362 (Wash. 1991). Here, Plaintiff seeks to enforce Defendant's duty, created by "applicable orders and regulations" of the Commission, to track calls placed from Plaintiff's payphones and to provide the tracking information to Plaintiff in order to help it pursue collection from other responsible carriers. *See, e.g.*, 47 C.F.R. § 64.1310(c)(1) (requiring each "Intermediate Carrier" to provide quarterly reports containing particular information about "all the facilities-based long

distance carriers to which the Intermediate Carrier switched toll-free and access code calls dialed from each of that payphone service provider's payphones").

For breach of that duty, Plaintiff seeks to recover all damages caused by its inability, in the absence of the necessary tracking information, to pursue collection from other carriers. Granting Plaintiff's requested relief would make Defendant financially liable for calls other than those for which the regulations make it responsible. In this circumstance, we agree with Defendant that Plaintiff's negligence claim is preempted.

In enacting the payphone regulations, the Commission's primary purpose was to create a system for compensation. *See* 47 U.S.C. § 276(b)(1)(A) (directing the Commission to adopt a "compensation plan"). As we stated above, a primary objective – and a primary difficulty – for the Commission has been to settle confusion over which carrier is responsible for payment when more than one carrier handles a call. *See 2003 Payphone Order*, 18 F.C.C.R. at 19,976, ¶ 2 ("These rules satisfy section 276 by identifying the party liable for compensation and establishing a mechanism for PSPs to be paid."); *APCC Servs.*, 20 F.C.C.R. 2084, ¶ 25 (refusing to accept an argument that "conflicts with the Commission's reasoned decision to place responsibility on facilities-based carriers only"). Here, imposing a duty that may make carriers liable for calls for which other carriers are responsible would be inconsistent with the Commission's careful assignment of liability.

We do not hold that state law remedies – for example, damages for breach of an express contract relating to payphone services – would be preempted simply because

they provide recovery in amounts more than the contractual or default per-call amount. *See Bates*, 125 S.Ct. at 1800-01 (holding that an additional remedy does not constitute an additional "requirement"). Here, however, where Plaintiff seeks to impose liability under state law by shifting to Defendant the payment obligations of a carrier other than Defendant, we hold that its claim is inconsistent with the federal system and therefore preempted by § 276(c). We accordingly reverse the district court's decision to grant Plaintiff leave to amend its complaint to add a negligence claim.

3. *Conclusion*

The Commission's regulations reveal an intent to create predictability in payphone compensation, but they do not require uniformity at the level that Defendant asserts, at least with respect to rates and methods of payment. The regulations contemplate that parties will enter into mutually acceptable agreements that automatically override the Commission's prescriptions, and state contract law must have a role in regulating those agreements. Nothing in § 276 or the Commission's regulations precludes state common law actions to enforce obligations identical to those set forth in the Commission's regulations. Because, as the Commission states in its amicus brief, claims for compensation "involve largely factual questions" and any policy issues that do arise can be referred to the Commission under the doctrine of primary jurisdiction, we see little danger of inconsistent administration of federal policy. *See Precision Pay Phones*, 210 F. Supp. 2d at 1119 ("The federal ingredient involved here – the setting of the per call dial-around rate in the absence of a contract – requires no interpretation of federal law.

Hence, there is no compelling need for a federal forum to *e.g.* facilitate national uniformity in the interpretation or application of federal law." (footnote omitted)).

Therefore, we affirm the district court's decision to deny judgment on the pleadings as to Plaintiff's claim for quantum meruit. We also affirm the court's decision to allow Plaintiff to add a claim for breach of contract implied in fact, but we reverse the decision as to Plaintiff's negligence claim, which seeks to impose liability in a manner inconsistent with the federal payphone regulations.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion. Each party shall bear its own costs on appeal.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

METROPHONES TELECOMMUNICATIONS, INC., Plaintiff(s), v. GLOBAL CROSSING TELECOMMUNICATIONS, INC., et al., Defendant(s).	No. C03-0694P ORDER ON DEFENDANTS' MOTIONS TO DISMISS AND PLAINTIFF'S MOTIONS TO AMEND
METROPHONES TELECOMMUNICATIONS, INC., Plaintiff(s), v. SOUTHWESTERN BELL COMMUNICATION SERVICES, INC., and WILTEL COMMUNICATIONS, INC., Defendant(s).	No. C03-0809P
METROPHONES TELECOMMUNICATIONS, INC., Plaintiff(s), v. VARTEC TELECOM, INC., Defendant(s).	No. C03-0811P

This matter comes before the Court on several nearly identical motions in three related cases. Plaintiff

Metrophones Telecommunications Services, Inc. ("Metrophones"), a "payphone service provider," has brought three lawsuits against four long distance phone service carriers, Global Crossing Telecommunications, Inc., Southwestern Bell Communication Services, Inc., Wiltel Communications, Inc., and Vartec Telecom, Inc. The cases were originally assigned to three different district judges, but the later two were reassigned to Judge Marsha Pechman on the Court's own motion as related to C03-0694P, as all three cases present substantially similar legal issues. In each of the cases, Metrophones originally asserted a private right of action under Section 276 of the Telecommunications Act of 1996 and the common law cause of action of quantum meruit. The Ninth Circuit then declared that no such private right of action exists, and each of the defendants in these cases moved to dismiss the § 276 claims on this ground, and to dismiss the quantum meruit cause of action as preempted. *Greene v. Sprint Communications Co.*, 340 F.3d 1047, 1052 (9th Cir. 2003). Also in each case, plaintiff Metrophones has moved to amend the complaints to include federal causes of action under three other sections of the Telecommunications Act, as well as two other common law causes of action. Defendants oppose the amendments, contending that such amendment would be futile. Having reviewed the papers and pleadings submitted by the parties, the Court hereby GRANTS the defendants' motions to dismiss as to the § 276 claims, but denies those motions as to quantum meruit, as the Court does not view those claims as preempted. In addition, the Court GRANTS the motions to amend, as a private right of action will be allowed under two of the three sections of the Act, and the common law causes of action are not preempted. As these cases involve two controlling questions of law that present novel issues

in the Ninth Circuit, the Court will entertain a proper motion for certification of interlocutory appeal under 28 U.S.C. § 1292(b).

BACKGROUND

Plaintiff Metrophones is a "payphone service provider" that owns and operates public payphones. Metrophones brings these lawsuits against Global Crossing Telecommunications, Inc. ("Global Crossing"), Southwestern Bell Communication Services, Inc. ("Southwestern Bell"), Wiltel Communications, Inc. ("Wiltel"), and Vartec Telecom, Inc. ("Vartec"), which are interexchange (long distance) carriers, for an alleged failure to pay compensation for coinless payphone calls made using Metrophones' payphones.

Payphone service providers ("PSPs") such as plaintiff are compensated for the use of their payphones in two primary ways, either through direct payment by the caller by insertion of coins into the payphone, or "commission payments" from the PSP's "presubscribed carrier," the carrier to which operated-assisted calls are automatically routed. Compl. at 3. Yet calls are also made without utilizing either of these compensation methods, namely credit card (access code) calls and toll-free calls (collectively "coinless" calls). *Id.* For these calls, the caller pays the interexchange (long distance) carrier, but there is no direct means by which the PSP is compensated. *Id.*

In enacting the Telecommunications Act of 1996, Congress restructured and deregulated much of the local telephone industry. Relevant to the present lawsuit,

Section 276 of the Act was aimed at promoting competition in the payphone service industry.[1] That section prohibits "any Bell operating company that provides payphone service" from discriminating in favor of its own payphone service. 47 U.S.C. § 276(a). It also directs the Federal Communications Commission to promulgate regulations that:

> (A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation.

Id. at § 276(b)(1)(A).

To that end, the FCC has promulgated regulations and has issued orders requiring long distance carriers and local carriers to compensate PSPs on a per call basis for calls made using their payphones. 47 C.F.R. § 64.1300 (2003).[2] Specifically, the FCC now requires that the "completing carrier" (the interexchange or local carrier that

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[1] An in depth background of the Act and its history is set forth in *New England Public Communications Council, Inc. v. FCC*, 334 F.3d 69 (D.C. Cir. 2003).

[2] The regulations were substantially revised by the Commission's order of October 3, 2003, which switches the obligation to pay from the "first interexchange carrier" to the "completing carrier," and included local exchange carriers in the definition. *In the Matter of The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Dkt. No. 96-128, 2003 WL 22283556, 30 Communications Reg. (P&F) 609, F.C.C. (Oct 03, 2003). The Court does not perceive the changes in the regulations to affect the resolution of the issues presented in the motions before it.

completes a coinless call) must compensate the PSP at a rate agreed upon by the parties. *Id.* at § 64.1300(b). In the absence of such an agreement, the rate is twenty-four cents per call. *Id.* at § 64.1300(d). Further, it is the duty of the completing carrier to track the calls in order to ensure adequate compensation. *Id.* at § 64.1310(a).

After implementation of these regulations, several PSPs (including plaintiff Metrophones) brought an action against Sprint Communications Company for alleged underpayment of per call compensation owed under the regulations. Prior to the defendant even being served, the district court sua sponte dismissed the action on the ground that while § 276 authorized the FCC to promulgate regulations, it did not create an express or implied private right of action based on those regulations. The Ninth Circuit affirmed that decision in the absence of a defendant, holding that § 276 directs the FCC to establish a *plan* for compensation, but does not create a *right* to compensation. *Greene v. Sprint Communications Co.*, 340 F.3d 1047, 1052 (9th Cir. 2003). Although §§ 206 and 207 of the Act create liability for "violations" of the "provisions of this chapter" and a right to sue by persons damaged by such violations, the court reasoned that § 267 did not itself create a duty that one could "violate." *Id.* The court concluded that, unlike some other sections of the Act (i.e. 227(b)(3)(A)), § 267 did not establish a right to sue for violations of its corresponding regulations. *Id.* It appears that plaintiffs in that case did allege a common law quantum meruit cause of action as well, but this was not addressed by the court, and easily could have been dismissed on the basis of lack of subject matter jurisdiction.

Defendants now bring motions to dismiss,[3] arguing that plaintiff's § 267 cause of action has been rendered moot by the *Greene* decision, and that plaintiff's claim for quantum meruit is preempted by the Telecommunications Act, § 276(c). Plaintiff responds by arguing that the Court should hold in abeyance the motions to dismiss as they relate to the § 276 private right of action in order to allow the plaintiffs in *Greene* to file for a writ of certiorari. Plaintiff further argues that the quantum meruit claim is not preempted. Finally, plaintiff moves to amend the complaints to include both new theories of private right of action under the Act, and two other state common law causes of action. Defendants oppose the motions to amend on futility grounds, saying that an end run around *Greene* should not be allowed, and that each of the other state law claims is likewise preempted.

ANALYSIS

A. Private Right of Action Under § 276

Plaintiff argues that despite the clear mandate from the Ninth Circuit that there is no private right of action under § 276 or its regulations, this Court could refuse to "immediately implement the narrow holding of the three-judge panel in *Greene*," and hold the matter in abeyance until after it is determined whether the Supreme Court will grant a writ of certiorari on the issue, which plaintiff's counsel in the *Greene* case plans to file soon.

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[3] Defendant Global Crossing has styled its motion as a motion for judgment on the pleadings, but its arguments are identical to those presented in the other two cases.

The parties agree that *Greene* is the governing law in the present case, and also recognize that the filing of a petition for certiorari does not change the binding effect of the Ninth Circuit's decision on this Court. While plaintiff argues that the Ninth Circuit made the wrong decision in *Greene*, there is no authority for this Court to simply ignore it. *See Yong v. INS*, 208 F.3d 1116, 1119 n. 2 (9th Cir. 2000); *Wedbush, Noble, Cooke, Inc. v. SEC*, 714 F.2d, 923, 924 (9th Cir. 1983). Yet plaintiff asks the Court to do just that, based on its assertion that "the law in this area is not settled and because the *Greene* decision is still being appealed." Yet the Ninth Circuit has already denied a petition for rehearing en banc. Further, this Court does not presume to know, nor will it hazard a guess, as to what the U.S. Supreme Court will or will not do if presented with a petition for certiorari. What is certain, is that *Greene* is the current controlling law of the Ninth Circuit, and that is the law this Court must follow. The Ninth Circuit has definitively decided the issue, the motion is ripe for decision, and plaintiff's claim for a private right of action under § 276 is dismissed.

B. Preemption of State Law Claims Under § 276(c)

Federal preemption of state law originates from the Supremacy Clause of the Constitution, which invalidates laws that "interfere with or are contrary to federal law." *Total TV v. Palmer Communications, Inc.*, 69 F.3d 298, 302 (9th Cir. 1995) (internal quotations omitted). The rule regarding preemption is easy to state, yet tricky to apply – "'[t]he purpose of Congress is the ultimate touchstone' of the preemption analysis." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992), *quoting Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). There are three basic

situations in which preemption of state law occurs: (1) express preemption, where a federal statute specifically defines its preemptive force; (2) implied, or "field" preemption, where federal regulation of an area of the law is so complete that there is no room for state regulation to occur; and (3) conflict preemption, where compliance with both federal and state requirements would be impossible. *See Hillsborough County, Fla. v. Automated Medical Labs.*, 471 U.S. 707, 712-13 (1985). In addition, a cause of action may be said to "arise under" federal law "if the right to relief under" state law "requires resolution of a substantial question of federal law in dispute between the parties." *Franchise Tax Board of State of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 13 (1983).

The present cases involve a question of express preemption. In such a case, "the task of statutory construction [of an express preemption clause] must in the first instance focus on the plain wording of the clause, which necessarily entails the best evidence of Congress' preemptive intent." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002) *quoting CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). Section 276(c) of the Telecommunications Act of 1996, 47 U.S.C. § 276(c) provides:

> (c) State Preemption
>
> To the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matter shall preempt such State requirements.

The preemptive scope of this provision is relatively narrow. *Compare Morales v. Trans World Airlines*, 504 U.S.

374, 383-84 (1992) (recognizing broad preemptive effect of Airline Deregulation Act that preempts state laws "relating to" air carrier rates, etc.) *with CSX Transportation. Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (preemptive force of federal regulations "covering the same subject matter" viewed as narrow). When Congress intends broad preemptive force, it certainly knows how to provide for it.

While the express preemption clause of § 276 has yet to be interpreted by the Ninth Circuit, it is very similar in scope to the one interpreted in *Total TV v. Palmer Communications, Inc.*, 69 F.3d 298, 302 (9th Cir. 1995). There, the court was interpreting federal statutes regulating cable television, which included a provision stating that "no . . . state may regulate the rates for the provision of cable services except to the extent provided under this section and section 532 of this title." *Id.* at 301 and n. 4. The defendant argued that plaintiff's causes of action brought under the state's general unfair business practices act were preempted by the federal cable acts. The Ninth Circuit disagreed, finding that there was nothing inconsistent between the cable acts and the general state statute. *Id.* at 302. The court held that by using the language "regulate the rates," Congress had signaled its intent to limit preemption under the Cable Acts. *Id.*

The language at issue in § 276 is even narrower. In passing the Telecommunications Act of 1996, and in particular in enacting § 276, Congress provided a very narrow preemptive scope – one that is only invoked when "state requirements are inconsistent with the Commission's regulations." There is nothing inconsistent between the regulations promulgated pursuant to § 276 and the common law doctrine of quantum meruit. In fact, the purpose of each are entirely consistent. The regulations

were promulgated in order to "promote competition among payphone service providers and [to] promote the widespread deployment of payphone services." 47 U.S.C. § 276(b)(1). The doctrine of quantum meruit is an equitable one, serving to prevent the unjust enrichment of the defendant in the absence of an enforceable contract by forcing compensation to the plaintiff in an amount equal to the value of the benefit conferred on the defendant. *Eaton v. Engelcke Mfg., Inc.*, 37 Wn. App. 677, 680, 681 P.2d 1312 (1984). Competition is fostered by a level playing field, one on which there is equity. The purposes of the regulations and the doctrine of quantum meruit are aligned.

This result is also consistent with the statute's "savings clause," which states generally that "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 47 U.S.C. § 414. Though it is true that clauses such as these are ineffective if a state law is nevertheless in conflict with a federal statute or regulation, *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869 (2000) (doctrine of conflict preemption applies even in face of savings clause), such is not the case here. Nothing in § 276 indicates that Congress intended the regulations to provide the sole remedy regarding collection of monies owed to payphone service providers. Congress only intended to eliminate *inconsistent* state requirements.

Finally, plaintiff's quantum meruit cause of action should not be considered to "arise under" federal law as involving a "substantial question of federal law." "The fact that a case may turn in part upon the resolution of some issue of federal law or that federal law constitutes an ingredient of the state law claim for relief does not

automatically convert a state claim" into a federal one. *Precision Pay Phones v. Qwest Communications Corp.*, 210 F. Supp. 2d 1106, 1117 (N.D. Cal. 2002). In the present case, resolution of the state law cause of action for quantum meruit will not involve a substantial federal question. The FCC regulations in this case establish an obligation to pay on a per call basis and define a rate in the absence of a contract between the parties. Quantum meruit, under Washington law, is a remedy to compensate a plaintiff for the reasonable value of services rendered where retention of that value would be unjust. *Douglas Northwest, Inc. v. Bill O'Brien & Sons Constr., Inc.*, 64 Wn. App. 664, 683, 828 P.2d 565 (1992). Thus the only point at which the state law claim and the federal regulations connect is in establishing the reasonable value of the payphone services provided to the carriers. This does not involve resolution of a substantial federal question.

For each of the above reasons, the Court holds that the plaintiff's state law cause of action for quantum meruit is not preempted.

C. Motion to Amend Complaint

Plaintiff also moves to amend the complaints to include additional federal causes of action under three other provisions of the FTA and state law causes of action for implied contract and negligence.

Leave to amend pleadings "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Motions to amend are typically granted provided that the amendment will not unduly prejudice the opposing party, is not sought in bad faith, will not cause undue delay, and does not constitute an exercise in futility. *DCD Programs, Ltd. v.*

Leighton, 833 F.2d 183, 186 (9th Cir. 1987). Defendants oppose amendment of the complaints in these cases on the ground that the new alleged causes of action would not survive a motion to dismiss under Rule 12(b)(6) and would therefore be futile.

Plaintiff's amended complaints state three new theories of liability and private right of action. Specifically, plaintiff would like to amend in order to state a cause of action under § 201(b) of the Act, which ostensibly requires that all charges, practices, classifications, and regulations be "just and reasonable." Next, plaintiff argues that the regulations and "orders" issued pursuant to the FCC's rulemaking authority should be considered "orders for payment of money" as the term is used in § 407, which allows private parties who were the intended beneficiaries of the order to file suit against a party that has failed to comply with that order. Plaintiff also argues that § 416(c) establishes a duty to comply generally with orders of the Commission. None of these statutory provisions were at issue or addressed by the Ninth Circuit in *Greene*. Finally, plaintiff asks for leave to amend to include two more state common law causes of action for implied contract and negligence.

1. Section 201(b)

Section 201(b) of the Act provides that

> All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable *is declared to be unlawful.*

47 U.S.C. § 201(b) (emphasis added). Meanwhile, § 206 states that:

> In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or *declared to be unlawful*, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby . . .

47 U.S.C. § 206 (emphasis added). Finally, § 207 establishes the private right of action:

> Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recover of the damages for which such common carrier may be liable *under the provisions of this chapter*, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

47 U.S.C. § 207 (emphasis added).

In interpreting the above statutory provisions, the D.C. Circuit has held that a common carrier's failure to comply with a Commission "rate of return prescription" constituted a "per se violation of the requirement of the Communications Act that a common carrier maintain 'just and reasonable' rates" under § 201. *MCI Telecommunications Corp. v. F.C.C.*, 59 F.3d 1407, 1413-14 (D.C. Cir. 1995). This rationale was used to allow a § 201(b) cause of action for violations of the regulations promulgated under § 276 in *APCC Services, Inc. v. Cable & Wireless, Inc.*, 281 F.Supp. 2d 52, 58 (D.D.C. 2003).

The Court finds this authority persuasive. Although § 276 may not in and of itself provide for a private right of action, § 201 declares unreasonable practices to be unlawful. The Court finds that failure to comply with Commission regulations would per se be an unreasonable practice, and therefore violative of § 201. Since §§ 206 and 207 allow a private right of action for acts declared unlawful under the provisions of this chapter, plaintiff may state a cause of action for unreasonable practices under § 201.

The Court is further persuaded by the FCC's recent determination that "[a] failure to pay in accordance with the Commission's payphone rules, such as the rules expressly requiring such payment that we adopt today, constitutes both a violation of section 276 and an unjust and unreasonable practice in violation of section 201(b) of the Act" *In the Matter of The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Dkt. No. 96-128, 2003 WL 22283556, 30 Communications Reg. (P&F) 609, F.C.C. (Oct 03, 2003). This agency interpretation of the statute is entitled to substantial deference, as the precise issue of whether a violation of the Commission's regulations on PSP compensation would be a violation of § 201 is not specifically addressed by the language of the statute. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Accordingly, this Court will allow amendment of the complaints to include a cause of action under § 201(b).

2. Section 407

Section 407 of the Telecommunications Act provides that:

> If a carrier does not comply with an *order for the payment of money* within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States . . . a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suits the *findings and order of the Commission shall be prima facie evidence of the facts therein stated*, except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal.

47 U.S.C. § 407 (emphasis added). This provision, of course, must be read in the context of the entire statute. As explained above, § 207 allows a person to attempt to recover damages by *either* filing a complaint with the Commission or filing a suit for damages in district court. The sections that follow establish various procedures, including procedures for filing a complaint before the Commission (Section 208) and for issuance of "orders for payment of money" (Section 209). Section 407 then gives a person the right to bring an action in district court where a carrier does not comply with an "order for the payment of money."

The Court reads the term "order for the payment of money" as a term of art. Section 407 gives an [sic] means of enforcement against carriers who do not abide by the Commission's orders for the payment of money. It is clear from §§ 208 and 209 that such orders are made after a petition is filed by a complainant and an investigation is

carried out. The order then directs a specific carrier to pay money "*to the complainant*" (emphasis added) and must give a time period for compliance. Whether or not this is an "order" in the sense of an "adjudication" under the Administrative Procedures Act is unclear. But what is clear is that the Telecommunications Act itself provides a distinct procedure for the issuance of an "order for the payment of money" and its enforcement.

In the present case, plaintiff is not asking this Court to enforce an "order for the payment of money" that was issued by the Commission. Instead, it is asking for a remedy pursuant to rulemaking orders. Those rulemaking orders may address issues of compensation, but they are not "orders for the payment of money" as is contemplated under §§ 209 and 407. Plaintiff's motions to amend are therefore DENIED with regard to the cause of action under § 407.

3. Section 416(c)

Section 416 is entitled "Orders of Commission." Relevant to the present case is § 416(c), which decrees that "[i]t shall be the duty of every person, its agents and employees, and any receiver or trustee thereof, to observe and comply with *such orders* so long as the same shall remain in effect."

Unlike the "orders for payment of money" described in the above section, this section refers generally to "orders." There is no indication that this term is to be construed as "adjudications" as set forth in the Administrative Procedures Act. In fact, it appears that where Congress wanted to adopt the APA definition of "orders," it specifically did so. *See* 47 U.S.C. § 409. The Ninth Circuit has expressly

held that the APA definition should not be imported into the statute unless specifically stated. *Hawaiian Tel. Co. v. Pub. Utils. Comm'n*, 827 F.2d 1264, 1271 (9th Cir. 1987) (interpreting Section 401 of the Telecommunications Act). Neither does the statute itself provide any guidance as to what an "order" would entail. The Court does not, therefore, read the term to be so narrow. *APCC Services, Inc. v. Cable & Wireless, Inc.*, 281 F.Supp. 2d 52, 58 (D.D.C. 2003). Amendment of the complaints is therefore granted with regard to plaintiff's proposed § 416(c) cause of action.

4. Proposed State Law Claims

Plaintiff also moves to amend the complaints to include other state common law causes of action. For all of the same reasons stated above, the Court finds that plaintiff's state law claims of implied contract and negligence are not preempted by § 276(c) and the Commission's regulations. The amendment as to these claims will be allowed.

D. Interlocutory Appeal

Title 28, Section 1292(b) allows for interlocutory appeals as an exception to the general rule that only "final" orders are appealable. That provision provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a *controlling question of law* as to which there is *substantial ground for difference opinion* and that an immediate appeal from the order may *materially advance the ultimate termination*

> *of the litigation*, [she] shall so state in writing in such order.

28 U.S.C. § 1292(b) (emphasis added). Either the district court or the court of appeals may stay the case pending resolution of the appeal.

It appears that the present cases involve two issues of novel and controlling law as to which there is a substantial ground for difference of opinion, the first regarding alternative private rights of action under the Telecommunications Act for violations of regulations promulgated under § 276, the other regarding the preemptive scope of § 276(c). Thus, the Court will entertain a properly brought motion pursuant to 28 U.S.C. § 1292(b).

CONCLUSION

The Court holds that plaintiff's claims brought under § 276 of the Telecommunications Act against the various defendants in these cases must be dismissed under the Ninth Circuit's decision in *Greene v. Sprint Communications Co.*, 340 F.3d 1047, 1052 (9th Cir. 2003). However, plaintiff's claims for quantum meruit shall stand, as those claims are not preempted by the relatively narrow express preemption provision set forth in § 276(c) of the Act. Next, the Court finds that amendments to the complaints in these cases that assert causes of action under §§ 201(b) and 416(c) shall be allowed, as such amendments would not be futile. A cause of action under § 407, however, shall not be allowed. Finally, plaintiff's supplemental claims for two additional common law causes of action shall be allowed as well as they are not preempted by § 276(c).

The Clerk is directed to send copies of this order to all counsel of record. Dated: December 16, 2003.

/s/ Marsha J. Pechman
Marsha J. Pechman
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

METROPHONES TELECOMMUNICATIONS, INC., Plaintiff(s), v. GLOBAL CROSSING TELECOMMUNICATIONS, INC., et al., Defendant(s).	No. C03-0694P ORDER GRANTING MOTIONS FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292(b)
METROPHONES TELECOMMUNICATIONS, INC., Plaintiff(s), v. SOUTHWESTERN BELL COMMUNICATION SERVICES, INC., and WILTEL COMMUNICATIONS, INC., Defendant(s).	No. C03-0809P
METROPHONES TELECOMMUNICATIONS, INC., Plaintiff(s), v. VARTEC TELECOM, INC., Defendant(s).	No. C03-0811P

This matter comes before the Court on several nearly identical motions in three related cases. Plaintiff Metrophones Telecommunications Services, Inc. ("Metrophones"), a "payphone service provider," has brought three lawsuits against four long distance phone service carriers, Global Crossing Telecommunications, Inc., Southwestern Bell Communication Services, Inc., Wiltel Communications, Inc., and Vartec Telecom, Inc. The cases were originally assigned to three different district judges, but the later two were reassigned to Judge Marsha Pechman on the Court's own motion as related to C03-0694P, as all three cases present substantially similar legal issues. In each of the cases, Metrophones originally asserted a private right of action under Section 276 of the Telecommunications Act of 1996 and the common law cause of action of quantum meruit. The Ninth Circuit then declared that no such private right of action exists, *Greene v. Sprint Communications Co.*, 340 F.3d 1047, 1052 (9th Cir. 2003), and each of the defendants in these cases moved to dismiss the § 276 claims on this ground, and to dismiss the quantum meruit cause of action as preempted. Also in each case, plaintiff Metrophones moved to amend the complaints to include federal causes of action under three other sections of the Telecommunications Act, as well as two other common law causes of action. Defendants opposed the amendments, contending that such amendment would be futile. The Court granted the defendants' motions to dismiss as to the § 276 claims, but denied those motions as to quantum meruit, as the Court did not view those claims as preempted. The Court also granted the motions to amend, allowing a private right of action under two of the three sections of the Act, and finding that the common law causes of action are not preempted. As these cases involve two controlling questions of law that present novel issues

in the Ninth Circuit, the Court stated that it would entertain motions for certification of interlocutory appeal under 28 U.S.C. § 1292(b). Each of the defendants has brought such a motion, and plaintiff has not opposed those motions.

Title 28, Section 1292(b) allows for interlocutory appeals as an exception to the general rule that only "final" orders are appealable. That provision provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a *controlling question of law* as to which there is *substantial ground for difference* [sic] *opinion* and that an immediate appeal from the order may *materially advance the ultimate termination of the litigation,* [she] shall so state in writing in such order.

28 U.S.C. § 1292(b) (emphasis added). Either the district court or the court of appeals may stay the case pending resolution of the appeal.

The Court's December 16, 2003, order involved two controlling questions of law, namely (1) whether a private right of action exists under Sections 201(b), 407, and/or 416(c) of the Telecommunications Act for violations of regulations promulgated under Section 276 of the Act; and 2) whether Section 276(c) of the Act preempts state law claims, including quantum merit, negligence, and implied contract. These appear to this Court to be novel issues in the Ninth Circuit on which there is substantial ground for difference of opinion, in particular in light of the Ninth Circuit's decision in *Greene v. Sprint Communications Co.*, 340 F.3d 1047, 1052 (9th Cir. 2003). This Court also has no doubt that an immediate appeal from this order will

materially advance the ultimate termination of the litigation. It is in the interests of judicial economy to have these issues resolved prior to proceeding with the litigation, in particular because they go directly to whether plaintiff even has a cause of action and this Court's jurisdiction. The Court's order of December 16, 2003, is therefore certified to the Ninth Circuit Court of Appeals for interlocutory appeal. The cases will be stayed during the pendency of this appeal.

The Clerk is directed to send copies of this order to all counsel of record.

Dated: January 12, 2004.

/s/ Marsha J. Pechman
Marsha J. Pechman
United States District Judge